

No. 11891

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

ERNEST TSANG,

Appellant,

vs.

JOHN JOSEPH KAN,

Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division

FILED

MAY 21 1948

PAUL P. D'BRIEN,

CLERK









No. 11891

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

ERNEST TSANG,

Appellant,

vs.

JOHN JOSEPH KAN,

Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division

---



# INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer of Respondent Ernest Tsang to Petition Under Section 8, Selective Training and Service Act .....	5
Appeal:	
Certificate of Clerk to Transcript of Record on.....	35
Designation of Contents of Record on.....	33
Notice of.....	33
Statement of Points on.....	255
Certificate of Clerk to Transcript of Record on Appeal .....	35
Designation of Contents of Record on Appeal.	33
Findings of Fact and Conclusions of Law.....	20
Conclusions of Law.....	28
Findings of Fact.....	20
Judgment .....	29
Memorandum Opinion.....	15
Minute Order 1/16/48—Order Settling and Approving Findings of Fact and Conclusions of Law, Judgment, Order Denying Motion for New Trial and to Modify and Vacate Findings of Fact and Conclusions of Law and Judgment .....	32
Motion for New Trial and to Modify and Vacate Findings of Fact and Conclusions of Law and Judgment.....	30

	PAGE
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	33
Order Extending Time to Docket.....	34
Petition .....	2
Reporter's Transcript.....	36
Witnesses for Defendant:	
Hatch, Robert E.	
—direct .....	140, 181, 207
—cross .....	207
Tsang, Ernest	
—direct .....	154, 221
—cross .....	223
—redirect .....	248
Witnesses for Petitioner:	
Kan, Helen	
—direct .....	129, 249
—cross .....	129
Kan, John J.	
—direct .....	77, 103, 128, 137, 253
—cross .....	104, 128, 139
—redirect .....	140
—recross .....	181, 205
Romer, Sidney A.	
—direct .....	117
—cross .....	120, 131
—redirect .....	125, 133
Statement of Points on Appeal.....	255
Supplement to Answer of Respondent Ernest	
Tsang .....	12

## NAMES AND ADDRESSES OF ATTORNEYS

MR. ROBERT E. HATCH,

Mills Tower,  
San Francisco 4, California.

Attorney for Respondent and Appellant.

MR. FRANK J. HENNESSY,

United States Attorney,  
Northern District of California.  
Post Office Building,  
San Francisco, California.

Attorney for Petitioner and Appellee.

In the Southern Division of the United States  
District Court for the Northern District of  
California

No. 25864-R

JOHN JOSEPH KAN, Veteran,

Petitioner,

vs.

ERNEST TSANG, a General Partner, L. M. CAR-  
TER, GEORGE CHEW, GEORGE CHIN,  
PHILIP FONG, FRED LEONG and PAUL  
YUKE, Limited Partners, doing business under  
the name of Cathay House,

Respondents.

### PETITION

The petition of John Joseph Kan respectfully  
alleges that:

1. This is a petition under Section 8 of the Selec-  
tive Training and Service Act of 1940, As Amended,  
and the jurisdiction of this Court is based on that  
Act;

2. Petitioner is a resident of the City and County  
of San Francisco, State of California, residing at  
1060 Powell Street, thereof;

3. Respondents are now a copartnership consist-  
ing of Ernest Tsang, a General Partner, L. M.  
Carter, George Chew, George [1\*] Chin, Philip

---

\* Page numbering appearing at foot of page of original certified  
Transcript of Record

Fong, Fred Leong and Paul Yuke, together with petitioner and Helen Kan, his wife, as limited partners, and maintains a place of business known as the "Cathay House" at 718 California Street, San Francisco, California; that the time petitioner left the employment of respondents it was a corporation and was changed to a copartnership while petitioner was in the Army of the United States;

4. That on or about the 23rd day of July, 1943, at San Francisco, California, petitioner was inducted into the military service of the United States and thereupon entered into said service;

5. That immediately prior to petitioner's entrance into said service he was employed by the aforesaid corporation as a General Manager thereof at a salary of \$500 per month;

6. That petitioner left his aforesaid position on or about the 23rd day of July, 1943, for the purpose of entering into the military service of the United States;

7. Petitioner satisfactorily completed his said period of service in the Army of the United States on the 26th day of November, 1943, and on that date received an honorable discharge evidencing such satisfactory completion;

8. That within ninety days after petitioner was released from said Army services, petitioner made application to respondent for restoration to the position hereinabove described;

9. That petitioner is qualified to perform the duties of said position as set forth under the law and said position that he occupied prior to his entrance into the said military service and it was not a temporary one;

10. That respondents decline and refuse, and still decline and refuse to reemploy petitioner and to restore him to his said position, and further decline and refuse to restore him to his same [2] status and pay as he occupied and received prior to his entrance into the said military service, and by reason thereof have violated the provisions of the Selective Training and Service Act of 1940 and the Service Extension Act of 1941.

Wherefore petitioner prays that the respondents be specifically required to comply with the provisions of the Selective Training and Service Act of 1940, As Amended, and with the Service Extension Act of 1941 by reinstating the petitioner to the position of General Manager of the Cathay House and to compensate the petitioner for loss of wages and benefits suffered by reason of the respondents' unlawful action.

JOHN JOSEPH KAN,  
Petitioner.

/s/ FRANK J. HENNESSY,  
United States Attorney,  
Attorney for Petitioner.



State of California,  
City and County of San Francisco—ss.

John Joseph Kan, being first duly sworn, deposes and says:

That he is the petitioner described and who executed the above and foregoing complaint; that he has read the same and knows the contents thereof and the same are true.

JOHN JOSEPH KAN.

Subscribed and sworn to before me this 17th day of April, 1946.

[Seal] FRANCIS ST. J. FOX,  
United States Commissioner for the  
Northern District of California.

[Endorsed]: Filed April 18, 1946. [3]

---

[Title of District Court and Cause.]

ANSWER OF RESPONDENT ERNEST TSANG  
TO PETITION UNDER SECTION 8, SE-  
LECTIVE TRAINING AND SERVICE ACT

Answering the petition of John Joseph Kan, the respondent Ernest Tsang admits, denies and alleges as follows:

First Defense  
(Another action pending.)

This respondent alleges that there is now pending before another court another action between the same parties and involving the same subject matter, the determination of which other action will be res

judicata as to all issues of fact and law in the present action and will be a complete bar to all relief sought in the petition on file in the within case, namely that certain action entitled "Ernest Tsang, plaintiff, vs. John Kan, defendant," (being the same persons who are parties in the present action) number 333,586 in the Superior Court of the State of California, in and for the City and County of San Francisco, which action was commenced on October 21, 1944 by the filing of a certain complaint, to which said John Kan filed [4] his certain answer and cross-complaint therein on December 15, 1944, and wherein a judgment and decree of said Superior Court was duly and regularly made and entered on December 21, 1945, from which said Kan appealed to the District Court of Appeal of the State of California in and for the First Appellate District on January 29, 1946, and which said action on said appeal ever since has been and now is pending in said District Court of Appeal, and numbered therein 1 Civil No. 13,111.

Second Defense  
(Res judicata.)

This respondent alleges that each and every issue of fact and law presented by the petition on file herein already has been adjudicated and determined by a duly constituted court of law and equity having full jurisdiction of the persons of said John Joseph Kan and Ernest Tsang and of said subject matter, namely, that certain judgment and decree of the Superior Court of the State of California, in and

for the City and County of San Francisco, entitled "Ernest Tsang, plaintiff and cross-defendant, vs. John Kan, defendant and cross-complainant" (being the same persons who are parties in the present action), number 333,586, which said judgment and decree was duly made and entered on December 21, 1945 and determined and adjudicated, amongst other things, that said Kan "has no right to be employed by said corporation (The Cathay House), partnership (The Cathay House) or plaintiff (Ernest Tsang), and that said corporation, partnership and plaintiff are not obligated to employ defendant in any manner whatsoever. Cross-defendant (Tsang) is entitled to judgment on the cross-complaint and that cross-plaintiff take nothing."

### Third Defense

This respondent alleges that said petition does not state sufficient facts to constitute a cause of action against [5] this respondent, and even if the facts therein alleged were true, which this respondent denies, said appellant would not be entitled to any relief from this respondent.

### Fourth Defense

#### I.

This respondent alleges that immediately prior to July 23, 1943 this respondent was the president of The Cathay House, a California corporation, conducting a restaurant business at 718 California Street, San Francisco, California; that said peti-

tioner was an employee of said corporation and was being paid for all of his services as such, at the rate of \$500 per month; that said rate of compensation was fixed by the management of said corporation and the term of the employment was at the pleasure of the board of directors of said corporation, subject to immediate termination at any and all times and without notice of any kind; that petitioner's services at that time were wholly unsatisfactory to the board of directors of said corporation and to this respondent who as the owner of more than one-half of the stock thereof held the controlling interest therein; that said petitioner was at that time and for a long time theretofore had been on the verge of having his employment terminated by the corporation because of the last mentioned facts and was only being temporarily retained in the hope of the board of directors and of this respondent that said petitioner would mend his ways and make a conscientious effort to become a suitable and desirable employee, which for a considerable time theretofore he had not been. Prior to November 26, 1943, said corporation disposed of all of its interest in said restaurant business and ever since has been entirely inoperative and doing no business of any kind or character with no need or use for any employees to perform any of the services which said petitioner was ever employed by said corporation to perform. [6]

## II.

Shortly after November 26, 1943, said petitioner inquired of this respondent as to the willingness of

this respondent as general manager of The Cathay House, a limited partnership, then operating a restaurant business in the premises previously occupied and operated by said corporation, to employ said petitioner in said business but demanded as absolute conditions precedent to any such employment that his rate of compensation be \$750 per month and that he be given a written contract guaranteeing his employment for a period of the next succeeding three years regardless of whether said employee's services would be satisfactory and even regardless of whether he performed any services at all. No other or different demand or request was made or presented by said petitioner to this respondent at any time within ninety days after November 26, 1943, or otherwise. Within said ninety day period this respondent on behalf of said partnership offered, without any legal or moral obligation so to do but only as a kindly effort, to employ said petitioner to do similar duties to those for which he had been employed by said corporation and upon the same basis, namely, \$500 per month, and with unspecified term, and additionally assuring said petitioner that if he would make a conscientious effort to work for the benefit of said partnership, including himself, this respondent would do everything possible to make said employment congenial, permanent and profitable to said petitioner, but said petitioner refused to accept any employment upon that basis or any other basis that did not include the two prerequisites which he had demanded as above alleged.

## III.

Answering paragraph III, this respondent denies that there is now or at any time during the pendency of the within [7] action there has been a partnership consisting of Ernest Tsang, L. M. Carter, George Chew, George Chin, Philip Fong, Fred Leong and Paul Yuke, together with John Joseph Kan and Helen Kan.

## IV.

This respondent denies that said petitioner ever was or now is in his employment.

## V.

Further answering paragraph III, this respondent alleges that he has no knowledge or belief that any corporation was ever changed to any partnership at any time.

## VI.

Answering paragraph V, this respondent denies that said petitioner was ever employed by any corporation as a general manager.

## VII.

Answering paragraph VIII, this respondent denies that said petitioner ever made application to him for employment by this respondent of any kind and upon any terms or basis whatsoever.

## VIII.

Answering paragraph IX, this respondent alleges that said petitioner is not qualified to perform the duties of and is not a fit and proper person for employment by this respondent and that the position



which said petitioner had with The Cathay House; a corporation, prior to on or about July 23, 1943, was a temporary one.

IX.

Answering paragraph X, this respondent denies the allegations contained therein.

Wherefore, respondent prays that it be ordered, adjudged and decreed as follows: [8]

(1) That is action be abated until the final determination of said San Francisco Superior Court action No. 333,586; but if not,

(2) Dismissing said action, and/or that respondent is under no duty or obligation of any kind toward petitioner, and

(3) For respondent's costs of suit and such other relief as may be proper.

ROBERT E. HATCH,

Attorney for Ernest Tsang,  
Respondent. [9]

State of California,  
City and County of San Francisco—ss.

Ernest Tsang, being first duly sworn, deposes and says:

That he is the respondent herein; that he has read said answer and knows the contents thereof; the same is true of his own knowledge except as to those matters which are therein stated on informa-

tion and belief, and as to those matters he believes it to be true.

ERNEST TSANG.

Subscribed and sworn to before me this 17th day of May, 1946.

[Seal]                      ALFRED D. MARTIN,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed May 23, 1946. [10]

---

[Title of District Court and Cause.]

SUPPLEMENT TO ANSWER OF  
RESPONDENT ERNEST TSANG

Fifth Defense

On or about October 1, 1943, a limited partnership was organized with one general partner, the said Ernest Tsang, and several limited partners including said Kan and Tsang, and it owned and operated said restaurant business for a period of three years thereafter, all with the express consent of said Kan and all of the other stockholders of The Cathay House, a corporation. By the terms of the articles of said limited partnership it was to exist for a period of three years from said last mentioned date and no longer. Prior hereto, to wit, on September 30, 1946, said partnership expired by its own terms.



## Sixth Defense

On or about February 13, 1946, the said Kan instituted [11] an action in the Superior Court of the State of California, in and for the City and County of San Francisco, entitled "John Kan, et al., plaintiffs, vs. Ernest Tsang, et al., defendants," and numbered 349840 therein. In said action said court at the specific request of said Kan ordered and adjudged a dissolution of said partnership and ordered all of the assets thereof to be sold at public sale. In pursuance thereof, to wit, on August 30, 1946, said sale was conducted and all of the right, title and interest of said partnership in and to the said Cathay House, its business, good will, fixtures, furniture and all other assets were sold to the highest bidder. At no time thereafter has said The Cathay House, a corporation, or The Cathay House, a partnership, have any right, title or interest in and to any business or assets of any kind or character, except money on deposit in banks.

ROBERT E. HATCH,

Attorney for Respondent,

Ernest Tsang. [12]

State of California,  
City and County of San Francisco—ss.

Ernest Tsang, being first duly sworn, deposes and says:

That he is the respondent named herein; that he has read said supplement to answer of respondent Ernest Tsang and knows the contents thereof; the same is true of his own knowledge except as to those matters which are therein stated on information and belief, and as to those matters he believes it to be true.

ERNEST TSANG.

Subscribed and sworn to before me this 1st day  
of October, 1946.

[Seal]                      ALFRED D. MARTIN,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Oct. 2, 1946. [13]

In the Southern Division of the United States  
District Court for the Northern District of  
California.

No. 25,864-R

JOHN KAN,  
vs.  
ERNEST TSANG, et al.,

Petitioner,  
  
Respondent.

Action for reinstatement and compensation pursuant to the provisions of Section 8 of the Selective Training and Service Act of 1940, as amended.

Judgment for petitioner, in accordance with opinion.

Frank J. Hennessy, United States Attorney, and R. J. Scholz and Joseph Karesh, Assistant United States Attorneys, of San Francisco, California, attorneys for petitioner.

Robert E. Hatch of San Francisco, California, attorney for respondent Ernest Tsang.

### MEMORANDUM OPINION

Roche, District Judge: This is an action brought under Section 8 of the Selective Training and Service Act of 1940, as amended. The petitioner originally sought employment reinstatement together with compensation for loss of wages and benefits resulting from respondents' alleged refusal to reinstate him, but he now asks only a money judgment for such compensation, waiving other rights [14] that he may have under the Act.

Respondents defend on two grounds: First, that the issues herein have already been decided adversely to petitioner in certain proceedings in the superior court of the State of California, and second, that respondents offered to re-employ the petitioner at the salary he was receiving when he entered the armed forces but that petitioner refused to accept the offer unless it would include a three year contract of employment.

The record discloses that the petitioner Kan was not only one of the founders of the Cathay House, a restaurant in San Francisco, but its active head and the man whose energy and ability were largely

responsible for its phenomenal success. After its founding Tsang bought shares of stock in the business and he and the petitioner became the President and Secretary, respectively, of the corporation. They were co-managers, each receiving the same salary. When Kan received a salary increase, Tsang likewise received an increase. When Kan enlisted in the armed forces on July 23, 1943, he and respondent Tsang were both making \$500 a month. At that time, Tsang, by additional purchases of shares of stock, had gained a controlling interest in Cathay House.

While Petitioner was in the service the corporation was changed to a partnership, Tsang becoming a general partner and petitioner a limited partner, along with others. This change was agreed to by petitioner's wife, who was also employed at Cathay House and to whom petitioner had given power of attorney, but the evidence is conflicting as to whether she and her counsel endeavored to have the change delayed until the petitioner came home on leave. In any event, the change was one of form only. The interested parties remained the same and the restaurant business was conducted as before. Such a reorganization was ineffective to cut off the petitioner's rights under the Selective Service Act.

The petitioner was honorably discharged from the service on November 26, 1943, and shortly thereafter asked respondent Tsang to reemploy him. Tsang was then earning \$750 per month. [15]

From this point on the record contains much conflicting testimony but it does clearly appear that

at no time during the negotiations that followed petitioner's request for reemployment was the petitioner offered the position of co-manager with the same salary as Tsang was then receiving. The most that was offered was his old salary of \$500 a month and there is persuasive evidence that even that offer was conditioned on Kan's signing what the parties denominated a "waiver" or "release." The situation culminated in Tsang's filing an action for declaratory relief in the state court, in which Kan filed an answer and cross-complaint. Judgment was given in favor of Tsang. Kan and three others subsequently filed a suit for an accounting and dissolution of the partnership. The partnership was dissolved and the property sold, Tsang being the purchaser.

Respondents' defense of *res judicata* is based on the foregoing state court proceedings. It is true that the state court made a finding that respondent Tsang and the partnership had offered to restore Kan to the same position which he had held with the Cathay House corporation, but even assuming that such an offer met the Act's requirements, this finding cannot bind a federal court. The same defense of *res judicata*, based on a declaratory judgment rendered by the Ohio state court, was raised by the respondents in the case of *Trailmobile Co. v. Whirls*, 154 F. 2d 866, an action by a veteran for restoration to his seniority status as it existed prior to his entry into military service. The Sixth Circuit Court of Appeals disposed of the defense in the

following language: "The interpretation by the state court of the rights of a citizen under a federal statute is not binding upon the federal courts." The question for decision is thus one of fact—did any offer of reemployment made by respondents to petitioner comply with the terms of the Act.

So far as pertinent, the Act provides that if a position, other than a temporary position, was in the employ of a private employer, the person so employed shall be restored to such a position unless the employer's circumstances have so changed as to make it [16] impossible or unreasonable to do so. It is further provided that such restoration shall be without loss of seniority. The courts have been very liberal in construing these provisions, having in mind the purpose of the statute. They are more than patriotic promises. Rather, they are a guarantee to the honorably discharged veteran that, upon application timely made, he will be restored to his former position or to one of like seniority, status and pay and that he will lose no seniority in the process. If during the veteran's service in the armed forces, the person filling his position receives a higher salary, an offer to reemploy the veteran at his old salary is not a compliance with the Act. The veteran must be given the benefit of any wage increases that have been made during his absence. *Salter v. Becker Roofing Co.*, 65 F. Supp. 633. To the same effect are the decisions of the United States District Court for the Southern District of California in *Parker v. Boyce* and *Covey v. Douglas Aircraft Co.*



In the instant case, when the petitioner enlisted in the army he was co-manager with the respondent Tsang of the Cathay House and received the same salary. Upon his honorable discharge and application for reemployment, he was entitled to be restored to the position of co-manager and to receive the same salary that Tsang, the other co-manager, was receiving. An offer of anything less was not a compliance with the Act's provisions, nor was an offer conditioned on the veteran's waiving or releasing any of his rights guaranteed by the Act. Since the evidence conclusively shows that respondents failed to offer to restore the petitioner to his position as co-manager at the increased salary which respondent Tsang was then being paid, it follows that judgment must be entered in favor of the petitioner.

Petitioner having waived his claim for reinstatement and for all back pay, except for a twelve month period, it is

Ordered that there be entered herein, upon finding of fact and conclusions of law, judgment in favor of the petitioner in the sum of \$7,481.28, that being 12 months back pay at \$750.00 a month less \$1,518.72 earned by him from December 4, 1943, the date of his application for reinstatement, to December 4, 1944, and that respondents shall bear the costs.

Dated: November 13, 1947.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed] Filed Nov. 13, 1947. [18]

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial September 10, 11 and 12, 1947, before Honorable Michael J. Roche, United States District Judge, sitting without a jury; the petitioner, John Kan, appearing by his attorneys, Frank J. Hennessy, Esq., United States Attorney for the Northern District of California, Rudolph J. Scholz, Esq., and Joseph Karesh, Esq., Assistant United States Attorneys for the said district; the respondents Ernest Tsang, L. M. Carter, George Chew, Philip Fong and Paul Yuke, by their attorneys, Robert E. Hatch, Esq., and the other respondents, George Chin and Fred Leong, by consent filed in open Court, consenting to a judgment in favor of petitioner, and the evidence [19] having been received and the matter having been orally argued and briefed and fully considered, the Court now makes its findings of fact and conclusions of law as follows:

### FINDINGS OF FACT

#### I.

This is an action under Section 8 of the Selective Training and Service Act of 1940, as Amended, 50 U.S.C.A. App. 308, and Section 7 of the Service Extension Act of 1941, as Amended, 50 U.S.C.A. App. 357, and the jurisdiction of this Court is based thereon.



## II.

Petitioner is a resident of the City and County of San Francisco, State of California.

## III.

Respondents at all times herein mentioned were a copartnership consisting of Ernest Tsang, a General Partner, and L. M. Carter, George Chew, George Chin, Philip Fong, Fred Leong and Paul Yuke, together with petitioner and Helen Kan, his wife, as Limited Partners, and maintained a place of business, a restaurant known as the Cathay House, at 718 California Street, San Francisco, California. At the time petitioner left the employment of respondents it was a corporation and was changed to a copartnership while petitioner was in the Army of the United States. Prior to September 28, 1939, Petitioner Kan, in association with an individual, not a party to this action, commenced the business of operating Cathay House. Petitioner Kan interested respondent Tsang in purchasing stock in said corporation. Respondent Tsang became President and Kan became Secretary of said corporation and they were the sole persons actively engaged as managers in the actual operation of the restaurant. [20] The interests of the other stockholders were financial only.

## IV.

On or about the 23rd day of July, 1943, at San Francisco, California, petitioner volunteered for service in the armed forces of the United States and was inducted into the Army of the United

States and immediately thereupon entered the said service. Immediately prior to petitioner's entrance into said service he was employed by the aforesaid corporation as a General Manager thereof at a salary of \$500 a month. Immediately prior to petitioner induction into the Army of the United States respondent Ernest Tsang was likewise employed by the aforesaid corporation as a co-manager thereof at a salary of \$500 a month. At one time prior to petitioner's induction into the service, petitioner and respondent Tsang were compensated at the rate of \$200 per month. Thereafter both petitioner and respondent Tsang received simultaneous increases in pay from \$200 to \$300 a month, and from \$300 per month to \$500 per month.

#### V.

At the time petitioner entered the Army of the United States respondent Tsang was the owner of the majority of the stock in the aforesaid corporation. When the aforesaid corporation was changed to a copartnership respondent Tsang had the majority and controlling interest in the said copartnership and was in charge of the said business. During the time petitioner was in the armed forces respondent Tsang's salary was raised from \$500 per month to \$750 per month.

#### XI.

Petitioner left his aforesaid position on or about the 23rd day of July, 1943, for the sole purpose of entering the military service of the United States. Shortly before this date petitioner, in preparation

for departure for the armed forces, executed and delivered to his wife, Helen Kan, [21] a power of attorney to act for him in his absence, in connection with said business. At or about the same time, respondent Tsang, as President of the said corporation and the sole remaining active manager, promised and agreed with petitioner and his wife, Helen Kan, that he, respondent Tsang, would diligently protect petitioner's interests in the business. Thereafter Helen Kan assented, on behalf of herself and the petitioner, to the change of Cathay House from a corporation to a copartnership. The change was one of form only. The interested parties remained the same and the restaurant business was conducted as before.

#### VII.

Petitioner satisfactorily completed his period of service in the Army of the United States on the 26th day of November, 1943, and on that date received an honorable discharge evidencing such satisfactory completion.

#### VIII.

On or about December 4, 1943 petitioner made timely application to Cathay House, and more particularly to respondent Tsang, for restoration to the position hereinabove described.

#### IX.

The former position, hereinabove described, left by petitioner on or about the 23rd day of July, 1943, to enter the Army of the United States, was a position other than temporary. At the time of his

application for his former position, and at all times thereafter, petitioner was qualified to perform the duties of said position as set forth under the law.

### X.

Petitioner, in making application for reinstatement, stated to the respondent Tsang that he believed he was entitled to the same salary as that which respondent Tsang received, to wit, \$750 a month, but declared that he was willing to work for \$500 per month until the amount of salary would be definitely determined.

### XI.

During December, 1943, and January, 1944, petitioner continued to request of respondent Tsang reinstatement to his former position and negotiations were carried on during this period of time. In the latter part of January, 1944, respondent Tsang refused to reinstate petitioner at a salary of \$500 a month without attaching certain conditions to petitioner's reemployment. These conditions were: that petitioner sign a release waiving any rights he might have under the Selective Training and Service Act, approving the change of the Cathay House from a corporation to a copartnership and transferring his stock to his wife, Helen Kan. Petitioner stated he would not sign such a release to be employed at \$500 a month unless he were given a three-year contract. Respondent Tsang stated that under no condition would he employ petitioner for any period of time without petitioner signing the release, as above described, at a salary no more than \$500 per month.

## XII.

Respondent Tsang at all time has refused to re-employ petitioner at a salary of \$750 a month.

## XIII.

Respondent Tsang determined at the time petitioner made the request for reemployment, that he would under no circumstances rehire said petitioner at any salary and the [23] conditional offer of reemployment that he made was such that he knew the petitioner would not accept it and such conditional offer constituted a subterfuge to prevent petitioner's reemployment.

## XIV.

Immediately thereafter, as was his legal right, petitioner sought the assistance of the United States Attorney, who attempted to negotiate a settlement with the respondent Tsang through his counsel, Robert E. Hatch, Esq. These negotiations were continued through April of 1944. Petitioner indicated a willingness, through the United States Attorney, to be reemployed at a salary of \$500 a month, but respondent Tsang, through his said attorney, denied that he had any liability to reinstate petitioner to his former position under the Selective *Service* Training and Service Act of 1940 and continued in his refusal to reinstate said petitioner.

## XV.

Thereafter, and on or about the 20th day of October, 1944, respondent Tsang filed a complaint for declaratory relief against the petitioner in the Superior Court of the City and County of San Fran-

cisco in connection with petitioner's reemployment rights. Petitioner filed an answer and a cross-complaint to protect his interests. The decision of the Superior Court of the City and County of San Francisco is of no moment here, inasmuch as such decision of the State Court is not *res adjudicata* to the issues involved in our case herein.

## XVI.

During the war years the profits of the Cathay House increased enormously. It was not unreasonable that [24] the petitioner should have been re-employed at the Cathay House in the position of co-manager at a salary of \$750 a month. The position in said business of like seniority, status and pay to which petitioner is entitled is that of co-manager with respondent Tsang at a salary of \$750 per month.

## XVII.

Respondent Tsang in no way has been injured by petitioner's delay in instituting this action, such delay having been occasioned by the proceeding in the State Court instituted, as hereinabove stated, by the respondent Tsang. Respondent Tsang has likewise not been injured by the delay in bringing this case to its conclusion, the greater part of such delay being the result of a stipulation between counsel herein. The remaining respondents likewise have not in any way been injured by the delays hereinabove set forth.



## XVIII.

Petitioner was ready, willing and able to work for respondents from December 4, 1943, to December 4, 1944, and continuously thereafter, but as a result of the unlawful action of the Cathay House, and more particularly that of respondent Tsang, petitioner was not reinstated. From December 4, 1943, to December 4, 1944, petitioner earned in another position the sum of \$1518.72. By reason of the respondents' unlawful action, and more particularly that of respondent Tsang, in failing and refusing to reemploy petitioner, either in his former position or in a position of a like seniority, status and pay, he suffered a loss of wages between December 4, 1943, and December 4, 1944, in a sum of \$7,481.28, that is to say, he, the petitioner, suffered a loss of twelve months' pay at \$750 a month, less \$1,518.72.

## IX.

Petitioner does not request or desire reinstatement to his former position, but at no time since December 4, 1943, did petitioner abandon his right to reemployment and reinstatement in his former position with the Cathay House, and at all times has diligently pursued his claim for such employment.

## CONCLUSIONS OF LAW

The reorganization of the Cathay House from a corporation to a copartnership was ineffective to cut off petitioner's rights under the law.

Respondents, and more particularly respondent Tsang, unlawfully failed and refused from December 4, 1943, to December 4, 1944, and at all times thereafter, herein mentioned, to reemploy petitioner in his former position or in any position of like seniority, status and pay, contrary to Section 8 of the Selective Training and Service Act of 1940, as Amended, (50 U.S.C.A. App. 308), and Section 7 of the Service Extension Act of 1940, as Amended, (50 U.S.C.A. App. 357), and by reason thereof, petitioner suffered loss of wages amounting to \$7,481.28 between December 4, 1943, and December 4, 1944, and is entitled to be compensated by the respondent Ernest Tsang, General Partner, and by the said copartnership, consisting of the said Ernest Tsang, General Partner, and the respondents L. M. Carter, George Chew, George Chin, Philip Fong, Fred Leong and Paul Yuke, Limited Partners, doing business, together with petitioner and Helen Kan, his wife, also Limited Partners, under the name of Cathay House, in the said amount of \$7,481.28. [26]

Let judgment be entered accordingly forthwith, with costs of suit to be paid by respondents hereinabove described.

Dated at San Francisco, California, January 16th, 1948.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Jan. 16, 1948.



In the Southern Division of the United States  
District Court for the Northern District of  
California

No. 25864-R

JOHN KAN,

Petitioner,

vs.

ERNEST TSANG, et al.,

Respondents.

### JUDGMENT

This cause coming on regularly for trial before the Court, sitting without a jury, on September 10, 11 and 12, 1947, Frank J. Hennessy, United States Attorney; Rudolph J. Scholz and Joseph Karesh, Assistant United States Attorneys, representing the petitioner, and Robert E. Hatch, Esq., representing the respondent, Ernest Tsang, the sole General Partner, and also representing the respondents, L. M. Carter, George Chew, Philip Fong and Paul Yuke, and the other respondents Fred Leong and George Chin by consent filed in open Court, consenting to a judgment in favor of petitioner, and the Court having heard the testimony, examined the proofs offered by the respective parties, together with the [28] briefs therein, and the Court being fully advised in the premises and having heretofore filed its findings of fact and conclusions of law and having directed that a judgment be entered in accordance therewith, Now, Therefore,

It Is Hereby Ordered, Adjudged and Decreed that petitioner John Kan have judgment against the re-

spondent Ernest Tsang, sole General Partner of a limited copartnership doing business as the Cathay House, and against the copartnership consisting of the said Ernest Tsang, General Partner, and the respondents L. M. Carter, George Chew, George Chin, Philip Fong, Fred Leong and Paul Yuke, Limited Partners, doing business together with petitioner and his wife, Helen Kan, also Limited Partners, under the name and style of Cathay House, for the sum of \$7481.28, together with costs—taxed at \$80.42.

Dated at San Francisco, California, this 16th day of January, 1948.

MICHAEL J. ROCHE,

United States District Judge.

Ent. in Civil Docket 1/17/48, Vol. V—Pg. 415.

[Endorsed]: Filed Jan. 16, 1948. [29]

---

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL AND TO MODIFY  
AND VACATE FINDINGS OF FACT AND  
CONCLUSIONS OF LAW AND JUDG-  
MENT

Respondents hereby move the court for an order granting a new trial and modifying and vacating Findings of Fact, Conclusions of Law and Judgment heretofore entered.

Said motion will be made upon each of the following grounds:

- (1) Irregularity in the proceedings of the court or abuse of discretion by which these moving parties were prevented from having a fair trial;
- (2) Insufficiency of the evidence to justify the judgment and decision, and that the same are against law;
- (3) Error in the law, occurring at the trial and excepted to by these moving parties.

ROBERT E. HATCH,  
Attorney for Respondents.

Receipt of Service

The undersigned hereby acknowledges due service of the foregoing, waives any requirements for Points and Authorities or other matters of form and consents to the hearing of said motion on this date.

Dated: January 16, 1948.

FRANK J. HENNESSY,  
United States Attorney.

By JOSEPH KARESH,  
Assistant United States  
Attorney,  
Attorney for Petitioner.

[Endorsed]: Filed Jan. 16, 1948. [31]

District Court of the United States, Northern  
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 16th day of January, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Michael J. Roche,  
District Judge.

[Title of Cause.]

MINUTE ORDER

Order Settling and Approving Findings of Fact and  
Conclusions of Law, Judgment, Order Denying  
Motion for New Trial and to Modify and Va-  
cate Findings of Fact and Conclusions of Law  
and Judgment

This case came on regularly this day for settle-  
ment of findings. After hearing the arguments of  
Robert Hatch, Esq., for respondent, and Joseph  
Karesh, Esq., Assistant U. S. Attorney, for peti-  
tioner, it is Ordered that the findings of fact and  
conclusions of law herein be settled and approved  
and that judgment be filed and entered for the peti-  
tioner in the sum of \$7,481.28, with costs. Mr.  
Hatch filed a motion for new trial and to modify  
and vacate findings of fact and conclusions of law  
and judgment. Ordered that said motion be denied.

[Title of District Court and Cause.]

## NOTICE OF APPEAL

Notice is hereby given that Ernest Tsang, one of the respondents above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from that certain judgment heretofore entered herein, to wit on or about Jan. 16, 1948.

ROBERT E. HATCH,  
Attorney for Appellant,  
Ernest Tsang.

[Endorsed]: Filed Feb. 13, 1948. [33]

---

[Title of District Court and Cause.]

## DESIGNATION OF CONTENTS OF RECORD ON APPEAL (RULE 75a)

The undersigned designates the following to be contained in the record on appeal:

- (1) Petitioner's Petition.
- (1a) Respondent's Answer.
- (2) Supplement to Answer.
- (3) Opinion of the Court.
- (4) Findings of Fact and Conclusions of Law.
- (5) Judgment.
- (6) Motion for New Trial.
- (7) Minute Order Denying Motion for New Trial.
- (8) Notice of Appeal.

(9) Complete record and all of the proceedings and evidence in the action, as embodied in the Reporter's Transcript.

ROBERT E. HATCH,

Attorney for Appellant.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Mar. 1, 1948. [34]

---

In the Southern Division of the United States  
District Court for the Northern District of  
California.

No. 25864-R

ERNEST TSANG, et al.,

Libelants and Appellants,

vs.

JOHN KAN,

Petitioner and Appellee.

### ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellants herein may have to and including May 3, 1948, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: March 24, 1948.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Mar. 24, 1948. [35]

District Court of the United States  
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 35 pages, numbered from 1 to 35, inclusive, contain a full, true and correct transcript of the records and proceedings in the case of John Joseph Kan, Petitioner, vs. Ernest Tsang, a General Partner, et als., Respondents, No. 25864-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$5.60 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 2nd day of April, A.D. 1948.

[Seal]

C. W. CALBREATH,  
Clerk,

/s/ M. E. VAN BUREN,  
Deputy Clerk. [36]



In the Southern Division of the United States District Court for the Northern District of California

Before: Hon. Michael J. Roche,  
Judge.

No. 25864-R

JOHN KAN,

Petitioner,

vs.

ERNEST TSANG, et al.,

Respondents.

### REPORTER'S TRANSCRIPT

#### Appearances:

For Petitioner: Rudolph J. Scholz, Esq., Assistant United States Attorney.

For Respondents Ernest Tsang, Robert E. Hatch, Esq. [40]

Monday, May 27, 1946—2:00 o'Clock P.M.

The Court: You indicated heretofore the reason you were segregating these defenses. What was the reason?

Mr. Hatch: The reason is the case was tried at length in the State Court, and between the same parties, and involving the same issues, and it is, in short, that action is determinative, and such being the case, if the court so rules, it obviates the necessity of an extended trial upon the merits; in other words, it saves the time of the court and counsel in going into a trial which I think is unnecessary. May I proceed?



The Court: You may proceed.

Mr. Hatch: This, your Honor, is an action filed by John Kan under the terms of the Selective Service Act, wherein the United States Attorney appears in his behalf as provided by that Act. It was very recently filed. I represent the defendant Ernest Tsang. These gentlemen were, or are, involved in the operation of the Cathay House, which is a Chinese restaurant on California Street, at the corner of Grant Avenue, and have been for a period of time. The complaint in this action charges that in the year 1943 Mr. Kan, the petitioner, was in the Army, I think for a period of about three months, and upon his return from the Service he applied for his position, and asked to be reinstated at the [41] same rate and upon the same conditions as his employment before the war, which was \$500 a month, and that he was refused his re-employment, and that now several years have passed and that under the terms of this Act he is entitled to be heard and to an order of this court ordering him restored.

We have on file an answer in which we deny that he was ever employed by the defendant Ernest Tsang, and that he did not ask for his re-employment after he returned, but to the contrary we offered him his re-employment and he refused it. That is as far as the merits are concerned.

Then, as a special plea in defense, we allege the plea of another action pending, stating that there was a suit maintained in the Superior Court in the City and County of San Francisco, at which time the same issues were litigated, and there was a

judgment there entered that the man had not asked to be re-employed, but, to the contrary, the defendant Tsang had offered to employ him upon the same terms and conditions of his employment before the war, and that he had refused to accept them.

We plead *res adjudicata*, but in view of the fact that at the present time this petitioner, Mr. Kan, is prosecuting an appeal to the Supreme Court of the State of California, I doubt that the plea of *res adjudicata* is the right defense, but rather a plea in abatement. That is to say, there is another action pending. The matter comes on at this time [42] on my application for a separate trial of those affirmative defenses in the theory that if we are correct then it obviates the trial of the case upon the merits. That proceeding has been consented to by the United States Attorney, acting as Mr. Kan's attorney.

Therefore, at this time, I wish to offer in evidence on the separate pleas the various certified copies of the various documents of record in the Superior Court, together with certificate that that action is now pending. I have exhibited these to Mr. Scholz. He is fully familiar with them. I ask they be received.

The Court: Admitted and marked.

(Certified copies of Superior Court records marked Respondents' Exhibit A.)

Mr. Hatch: I have also tendered a stipulation to Mr. Scholz and I believe he should consent to it. It is in substance, 1, that the Superior Court is a court

of general jurisdiction and that Mr. Kan and Mr. Tsang, at the time of the litigation, were both citizens, residents of the City and County of San Francisco, the court had jurisdiction of the parties, and I think the subject-matter, and, further, I offer to prove at this time, either by the testimony of Mr. Karesh, the Deputy United States Attorney, or by stipulation, that prior to the litigation being prosecuted in the Superior Court, Mr. Kan was in consultation with the office of the United [43] States Attorney, and knew at that time that he could, if he chose, prosecute his rights under this Act of Congress in this forum, but elected to proceed in the State Court. I think there is no dispute as to the identity of issues, the only question apparently being raised by the petitioner at this time being indicated in a memorandum which was served upon me this morning, in which they assert that this court was the one that had jurisdiction of the issue, and that the State court did not have jurisdiction. It is my position that both courts had jurisdiction, and that where Mr. Kan, himself, selected the State court to prosecute his rights, that this court should adhere to the ruling of the State court and should not attempt to re-try the case; secondly, that if the determination of the State court is no ultimate determination at law, that is to say, the right to re-employment was one beyond the jurisdiction of that court and should be heard by this court, which I dispute, then that is substantially a determination of the facts between the parties, that this court should not re-examine the facts, but might decide the law

applicable to those facts which have already been determined. In other words, *res adjudicata* has two branches; one, a judgment is a bar to further action; and, secondly, a determination of a court of competent jurisdiction having the parties before it making a determination of the facts, even if not a determination of the law, that that determination of the facts is conclusive. In that [44] respect I have filed a memorandum in this court, and I think there is no dispute as to the legal position.

Then if I might turn to the way this matter comes before the court at this time. Several years ago when Mr. Kan was released from the Army, it was while the war was still in progress, he went out on a medical discharge or some such matter before the war was over. When he returned he did have some discussions with the defendant. At that time they were unable to get together on a satisfactory arrangement between the two, and Mr. Kan then came to the United States Attorney's Office and made a report of his position, and there were two or three meetings with Mr. Karesh and myself, looking to a settlement of the rights. We were unable to reach a fair conclusion as to what should be done, what was right between the two. So the defendant, Mr. Tsang, at my instance, filed an action in the Superior Court in declaratory relief, alleging that Mr. Kan was going around making various claims, but the claims varied to such an extent that he, Mr. Tsang, was unable to determine what they were, or what the rights of Mr. Kan were, if any. We had in mind then, of course, that if we did not start the

ball rolling to get to an issue on it the thing would go along interminably, and if in the long run Mr. Kan were found to be entitled to re-employment, he would be entitled to back pay. We wanted to find that out as soon as possible. Mr. Kan was not taking any initiative to bring this [45] matter into court.

As a matter of fact, we brought a proceeding in the State court to perpetuate his testimony later, and he refused to give his testimony, so then we brought this action in declaratory relief. That was served on Mr. Kan several years ago. But knowing his rights as advised by Mr. Karesh to proceed in the Federal court, Mr. Kan elected to proceed in the State Court.

Now, over there in the State court, one of counsel was Judge Alden Ames. Mr. Kan filed an answer in that declaratory relief, and a cross-complaint, in which he specifically alleged that he was entitled to re-appointment under the terms of the Selective Training and Service Act of 1940, and he had been denied re-employment, so he was asking the court to order his return to work, and for back salary, and numerous other things. In due course that case went to trial. The parties were under no coercion and Mr. Kan, if he had chosen, selected this court, but it went to trial before Judge Frank J. Deasy, and after an extended trial and consideration by the court, the court decided in favor of Mr. Tsang, as will be reflected from the certified copy which I have offered in evidence. Judge Deasy found at no time had Mr. Kan actually offered to or asked for re-employment upon the same terms and conditions as ex-



isted before he went into the service, but to the contrary, instead of \$500 a month he wanted [46] \$750 a month, and instead of his previous employment, which was at the will of the employer, he wanted a three-year contract in writing, guaranteeing they would not discharge him, even if he did not perform any duties, and that those were unreasonable, and they were not the terms that he was entitled to ask for. Of course, he had a right to ask for anything he wanted, including the moon, I guess, but the court specifically found that at no time did he ever ask for or agree, or was not willing and had refused to return at \$500 a month. So the court found as a result he had sustained no damages, he was not entitled to re-employment and, furthermore, that because of certain acts which Mr. Kan did following his return from the service, that he was not a fit and proper employee, that he could not be re-employed without exposing the defendant to irreparable damage. I might say what that was. After he was turned down in his desire for a job at \$750 he brought a loaded gun into the place and, using opprobrious language, threatened to kill my client. Under all those circumstances the decree was formally entered by Judge Deasy and an appeal was prosecuted by Mr. Kan to the Supreme Court, where it is now pending. They have obtained a stipulation extending their time to file a brief. That was the status of this case up to a couple of weeks ago.

Then Mr. Kan returned to the United States Attorney and [47] as a result this action, almost word for word, comparable to Mr. Kan's answer and

cross-complaint in the Superior Court action, again referring to the same Congressional statute, and again asking for the same relief, was interposed in this court. It was for that reason that at this time we feel that there is another action pending, the matter has already been determined, and that this court, first, should exercise its discretion by not retrying this case and, secondly, that whether it is discretionary or not, the proceedings that have been prosecuted in the State court are such that this plaintiff is barred from any relief.

I anticipate the statement of Mr. Scholz as it appears in his memorandum filed this morning. He refers to this statute, wherein it is stated that upon circumstances of this character, I read from the code, United States Code Annotated, "The District Court of the United States for the District in which such private employer maintains a place of business shall have power, upon a filing of a motion or a petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employee to comply with such provisions, and as an incident thereto to compensate such person for any loss of wages or benefit suffered by reason of such employer's unlawful action."

Now, the query is, What is the meaning of that statute [48] where it says, "This court shall have the power?" I believe, if it please the Court, that that is not right. The fact that unless there is special statutory enactment the Federal court, as a court of limited jurisdiction, would have no authority merely



providing, as the rest of the statute says, that if a man returns from a service with an honorable discharge he is entitled to re-employment upon terms and conditions therein specified would not give the Federal court the right to entertain jurisdiction unless there were diversity of citizenship or some prerequisite to jurisdiction, so the Congress has added in that very statute that this court, the district court, should have the power, that is to say, the jurisdiction to entertain such matter. It does not either directly or indirectly negative the fact that the Superior Court has the power, the Superior Court as ultimately differentiated between the Federal court—it is a court of general jurisdiction. The Superior Court, to reiterate, your Honor, has jurisdiction to determine controversies upon all subjects which are not excluded by statute or by law, so there is no doubt but unless you find some place a negating of ~~that~~ authority, some place where the Federal authority says we assume exclusive jurisdiction on this statute—there is no doubt but that the State court is one of competent jurisdiction. They would have to say in this statute, either inferentially or positively, that this jurisdiction lies exclusively with [49] the Federal court, or that the Federal court has excluded the State court from the jurisdiction of this matter.

In summary, my thought is this, that the Superior Court did have jurisdiction to make the very declaration which it did, and that was brought about not by my client but by Mr. Kan, when he came in and pleaded in response to our action for declaratory

relief what his rights were; in other words, he was the one who invoked the jurisdiction of the State court. Regardless of the State court's right, however, to determine the ultimate law under this statute, I contend that the State court has found facts. Those facts admittedly would bar a successful prosecution of this action. In other words, if the Court accepted the findings which have already been made, and I am now differentiating between the findings of fact and the conclusions of law, if this court is inclined to accept the findings of fact made by Judge Deasy then, of course, it would be similar to having a demurrer sustained under the old practice, in that the court did find as a matter of fact, that the petitioner in this case, John Kan, never at any time was willing to or indicated or requested re-employment on the basis that he was employed before the war, but only after he returned to employment in the event that he was given something in addition, that is to say, a 50 per cent wage increase and a contract for the ensuing three years. Under those circumstances I think this court should decline [50] jurisdiction at this time.

Mr. Scholz: Mr. Hatch, I think, has gone rather extensively into what he feels has been proven. We don't know what has been proven in the State court, because we were not there. However, I think it must be admitted for the purpose of this motion that all of the allegations of the complaint are true, and I think the court has to accept that. I questioned Mr. Hatch the last time it was continued if there would be any question of any testimony. Mr. Hatch told

me there would not be. Consequently, we are not prepared to put on any testimony, and we don't think there should be any taken in this case. Therefore, all the statements as to evidence, I believe, should be disregarded.

As to the evidence, I may say this, that the case is reasonably satisfactory. It can be proven and we don't know until there is a trial—that is why we filed the petition here to restore the veteran to his position he had before he entered the armed service of the United States. Some of the defendants who were limited partners admitted the allegations of the complaint. I have a signed statement of that. Mr. Hatch stated that Mr. Kan came to the United States Attorney and was thoroughly advised before he filed this suit in the State Court. I don't think that is strictly true because one of the assistant United States attorneys did handle this before I came here, he referred the matter back, as is customary for our office, [51] to the Attorney General for advice, whether or not they should file the petition. At the time the State action was filed by Mr. Hatch, the declaratory relief action, we had not been advised whether the Attorney General would want us to file this petition or not. When a letter from the Attorney General came back advising us to file a petition the letter was referred to me and I filed the petition about two or three weeks ago. The matter in the State court, of course, was tried some time ago. So, consequently, Mr. Kan could not have been advised that he could file the suit in the United States Court, because it would have to be done

through the United States Attorney, and at that time we were not in a position to advise him it could be done. Incidentally, we had a full, extensive report covering the full matter, compiled by the FBI before we decided to go into it. Whatever Mr. Tsang told Mr. Kan—regarding the matter of res adjudicata, or the equivalent, as far as this is concerned, that there is another action pending, I think Mr. Hatch will agree with me the res adjudicata definitely is out because there is an appeal in the State Court which he shows on his own evidence.

The Court: Why should this court interfere since this matter is pending in the State Court?

Mr. Scholz: In this respect, your Honor. In the first place, it is our position that the action in the State Court is not the same action as here. In the second place, the Federal [52] court has sole, exclusive jurisdiction, and if the Federal court only has jurisdiction, consequently the State court has not jurisdiction. It would not mean anything. I may say this is, I believe, the first case of this kind before your Honor, and, as I said in my Points and Authorities, the act must be very liberally construed to the purpose for which it was intended. After the last war there was a lot of discontent because men who had gone in the Army came back and found while they were working for \$30 a month, men who had stayed at home had profited more or less by it, and there was much discontent. Congress realized that, and in order to ameliorate that condition passed this statute, which provided that when a man joined the armed forces he could come back and

would be restored to his position, the same position he occupied before he left with the armed services, under certain conditions which are very easy to comply with. That was one of the purposes.

The second purpose was for morale. I think I can speak particularly on that because the last five years I was in the Army as a colonel in the infantry, and the question of morale was the highest question; if a man left his wife and family, his job or position, and returned after five or six years and found everything taken from him he would be particularly concerned, and it was for the morale of those who were inducted into the Army that this Act was passed.

The Court: The language in the Act says that this court [53] has exclusive jurisdiction?

Mr. Scholz: No, it does not say exactly that. I will read the Act. (Reads.)

In other words, it says that the district court of the United States shall have the power, it does not state that any court shall have the power but the district court of the United States.

The Court: Well, let's carry that out a little further.

Mr. Scholz: Yes.

The Court: Here is a man who selected the State court in which to defend his legal rights. It is now pending there. Why should this court interfere with it?

Mr. Scholz: The only reason we can suggest is this: First, I may say this, that we don't think that that is the same action in the State court as here.



Nowhere in the complaint or the cross-complaint, or the findings, or anything, or in the entire testimony, and Mr. Kan is here now if your Honor objects to my testimony, he will say there is nothing in that entire action that asks not to be restored to his position.

The Court: Well, dealing with the same subject matter.

Mr. Scholz: I don't think so.

The Court: Unless Mr. Hatch has misled the court, and I don't think he would do that.

Mr. Scholz: I have known Mr. Hatch for many years, and I don't think—I know he wouldn't. [54]

The Court: He said it was the same subject matter.

Mr. Scholz: I know.

The Court: The record discloses that that is the statement he made to the court.

Mr. Scholz: That is his position. I wouldn't mislead this court, either, because it means nothing to me, perhaps, I wouldn't do it otherwise, but it is my opinion that it is not the same action.

The Court: What is your understanding of it?

Mr. Scholz: The action filed in the State court, first for a declaratory relief action, in which he says Mr. Kan claims something which we don't know what he claims, we want him to show what it is before the court. Then to that a cross-complaint was filed. In that cross-complaint they asked for specific and general damages; specific damages for loss of wages under agreement, and general damages for alleged fraud by which Tsang took over control

of the corporation. There is nothing asked that he be restored to the position he occupied before he entered into the army.

The Court: Very well.

Mr. Scholz: Would your Honor like to hear from Mr. Ames?

The Court: Yes.

Mr. Ames: Your Honor, I really am not an attorney of record here; therefore, I am not actually privileged to address the court, but I have been in intimate familiarity [55] with this case from the very beginning. I perhaps could add a little bit of explanation to what Colonel Scholz has said. There is no question, your Honor, and I do not think that anyone here is trying to evade the question that this litigation, both in the State court and here, today, arose out of the same set of facts and due to that there is no doubt but that in the **cross-complaint** which I filed on behalf of Kan, who is the petitioner here, I did not make reference to the statute which Colonel Scholz has quoted, and to that extent the subject-matter is the same.

We come down to a question of definition of what is the subject-matter, and whether or not it is similar. I have this thought to suggest to your Honor: This United States statute, as it is phrased, gives the United States District Court power to command an employer to take back his employee. Now, I know of no such provision in the State law, and I know of no way that we could at any time bring such a proceeding in the State court. To a certain



extent, it is a quasi-criminal proceeding. As far as this United States Court is concerned, all that happened in the State court with respect to the same subject-matter, there is no question about that, is that they had this dispute between them. Mr. Hatch, representing a man named Tsang, who had taken over the entire business, precipitated the matter by filing a suit for declaratory relief, saying that there was a controversy. The complaint is the [56] most general thing you ever read. I did not even bother to demur to it on that ground, because I was more anxious to get the matter into court then on behalf of Kan, who was prior to going into the Army, together with this fellow Tsang, a co-employee of a corporation which was taken while Mr. Kan was in the Army into a partnership. I did file on his behalf a cross-complaint seeking damages. That is all that could be done in the State court, was to seek damages for refusal to take the man back into the business. That was all that was before the State court. That issue, the issue of damages plus also an issue of fraud. We raised the question that when Kan was away in the Army this fellow Tsang grabbed the business with the purpose and intent of defrauding Kan. That is why he had to apply to Tsang when he came back. That issue is also before the State court. Judge Deasy, as Mr. Hatch said, did hold against us on all of those different issues; no doubt about that. There is nothing in the prayer of the cross-complaint to ask that we be taken back into the employ of this business,

because from my point of view I did not believe that that was the kind of thing that the State court had the power to do. This proceeding is definitely just that.

Colonel Scholz's petition is very brief. He says the man was in the Army. He came back and demanded his employment, and his employment was refused. Therefore, the District Court should command his restoration to the position. In that sense there is no similarity between the proceedings. In the other sense, of it being based on the same set of facts, of course, that is true.

(Memoranda of Points and Authorities were then argued by respective counsel.)

The Court: I think, on account of the history of this whole matter, so there cannot be any question about it, you should dispose of the matter in the State court to final judgment and then make the application here, and set it down for trial on the merits on the jurisdiction, as counsel has indicated.

Mr. Ames: Purely as a matter of abatement, your Honor.

The Court: I will abate the matter until any reasonable time. What time?

Mr. Scholz: I think that would be a good idea, too, if agreeable to all concerned, because by that time we should have some decision on the part of the Supreme Court.

The Court: I think since they have taken the matter up in the State court that should be disposed

of. It would be helpful to this court because on the merits of this case if that decision is sustained, why, it would be bound to play a very definite part in the proceedings in this case.

Mr. Hatch: I think any court would be reluctant to find diametrically opposed to another court.

The Court: What time? [58]

Mr. Hatch: I would say December 31st. It is fairly safe a decision won't come out of the Supreme Court——

The Court: Well, I won't encourage—I will cut the time shorter than that if it will bring both sides to a quicker determination.

Mr. Hatch: The Supreme Court has a practice over there of not deciding any case until their pay is about to become delinquent, which is three months after the month in which it is submitted; so if it has not reached the argument stage it will still be a good three months before they decide it.

The Court: Better put it over to the latter part of September.

Mr. Ames: The last day of September?

The Court: Yes.

The Clerk: September 30th.

Mr. Hatch: Could I suggest a Monday?

The Clerk: That is a Monday.

The Court: September 30th.

Mr. Hatch: May I have an order returning to me the exhibits which I offered?

The Court: Yes.

Mr. Hatch: Thank you. [59]

Tuesday, September 30, 1946

Appearances:

For Petitioner: William E. Licking, Esq., Assistant United States Attorney.

For Respondent Ernest Tsang: Robert E. Hatch, Esq. [62]

The Clerk: Kan v. Tsang.

Mr. Licking: If your Honor please, Mr. Hatch, the attorney for the defendants, wrote me a letter and said he was attending the Bar Association meeting and requested that the matter go over one week.

The Court: One week. [63]

Tuesday, October 7, 1946

Appearances:

For Petitioner: Rudolph J. Scholz, Esq., Assistant United States Attorney; Alden Ames, Esq.

For Respondent Ernest Tsang: Robert E. Hatch, Esq. [64]

The Clerk: Kan v. Tsang.

The Court: What is before the Court this morning?

Mr. Scholz: The entire case.

Mr. Hatch: The matter of the pre-trial of the separate defenses was before the Court this morning. I would like to proceed with the trial of this matter within the reasonable future, a week or a month.

The Court: When will you be ready for trial?

Mr. Scholz: Any time—tomorrow?

The Court: Tomorrow morning, then.

Mr. Hatch: Yes, your Honor.

Mr. Ames: What time?

The Court: Ten o'clock tomorrow morning. [65]

Wednesday, October 8, 1946

The Court: Are all the parties of interest represented?

Mr. Hatch: Yes, your Honor. I represent Mr. Tsang.

The Court: Who is before the Court?

Mr. Scholz: If your Honor please, all the parties have been served. I may explain it this way that Kan is, of course, a veteran seeking to be restored to his position. There was a copartnership existing at the time, a limited partnership, consisting of Tsang as a general partner and about seven others as limited partners. They have all been served, but, as Mr. Hatch says, he only appears for the general partner in this case. The other partners have not appeared or have admitted all the allegations.

The Court: That is all I am concerned with.

Mr. Hatch: As I understand, we are proceeding on the affirmative defense as asserted by Mr. Tsang.

This case, your Honor, was filed by Mr. Kan through the United States Attorney seeking to be restored to a position that he had held with a certain corporation. Prior to the filing of this suit and while Mr. Kan was in the service, the business was transferred over to a partnership for purposes of minimizing taxes. It was transferred with the

consent of Mr. Kan. The partnership was organized for a three-year period. Mr. Tsang, who owns the preponderance of the stock in the corporation and who has a majority partnership interest and who was the only general partner in this partnership, interposed an answer [67] setting up various affirmative defenses, most particularly that there was another action pending, to wit, in the State Court, which would serve as a reason why this case should be deferred until that judgment became final.

By consent of counsel, we came before the Court some six months ago upon an arrangement to first try the affirmative defenses, those two affirmative defenses. It was presented here on an afternoon. When we got to the end, I would say a convenient point in the afternoon, the Court indicated it would be in order to continue the case until the 30th of September to see what action, if any, might be reached by the Supreme Court in the State Court proceeding.

The matter came up on the 30th and it was continued until yesterday, and on yesterday it was continued until today. So that, so far as we are concerned, we are here prepared to establish the affirmative defenses.

If the Court rules against us in respect to that, then it would be a matter of setting the case for trial upon the facts or showing.

The advisability of pre-trialing the affirmative defenses is that if the Court concurs with me, then it would be unnecessary to go into the great detail of the plaintiff's case and to try the case on the



merits. And when I say, "try the case on the merits," it is a retrial of the case as it was tried before Judge Deasy in the Superior Court. So that if I may [68] say so, I believe it was unnecessary for the other defendants to be represented at this time as we are interested in the affirmative defenses set up by Mr. Tsang.

It so happens I do represent several of the other partners and am prepared in due course to file formal appearance for them. They were not served. I had some discussion with the marshal about that. It is a little difficult to find some of these people around here.

Judge Ames, who represents Mr. Kan, also represents three other partners, and I presume that he will file an application if he has not yet done so.

Have you filed an application?

Mr. Ames: No, I haven't.

Mr. Hatch: Are your clients not joined as defendants?

Mr. Ames: I believe it is a proper statement in that regard, your Honor, that the two other names, men who were partners, Mr. Leong and Mr. Chin. They were served and do not desire to contest this matter.

Mr. Hatch: I don't know that any default has been taken for any formal appearance on their part. It is really an issue between Mr. Kan and Mr. Tsang.

The Court: I was hopeful that the matter would be disposed of in the State Court.



Mr. Scholz: If your Honor please, this matter came up some time ago, as Mr. Hatch said, in May, I believe, and this [69] matter was argued on the special defenses and at that time my notes showed that your Honor indicated you had jurisdiction of the special defenses, but particularly, another action pending in the State Court had nothing to do with this action.

The Court: I could be mistaken about it. I could change my mind as I have in important cases that they transfer over here. I think the Judges ought to get together on this. I am not altogether sure I have jurisdiction, so if there is any question about it, I will change my mind if you give me any reason.

Mr. Scholz: I think it would be advisable to dispose of that question first.

Mr. Hatch: I don't think there is any question but that the Court has jurisdiction.

The question is, should this Court first abate this action pending the outcome of the State Court case, and when I say abate, that is the State Court practice. Perhaps I should not use the vernacular. It is not an abatement in the sense of a criminal case.

The Court: Since there is a State Court action, couldn't the State Court dispose of this matter?

Mr. Hatch: Yes.

The Court: Well, why hasn't that been done?

Mr. Hatch: They have quite a few other cases in the State Court and we poor lawyers have no way of forcing the [70] judges to act any faster than they want to. As a result, this case has not

yet reached the calendar of the Supreme Court or District Court of Appeal. It is waiting its turn.

The Court: Do you think that will be helpful to us in any way?

Mr. Hatch: It is my position it would be res judicata and would dispose of this matter as a matter of law.

The Court: Is it coming up in the Supreme Court today?

Mr. Hatch: It has not reached the calendar yet.

The Court: Didn't you say there was something pending in the Supreme Court?

Mr. Hatch: This case, raising the same issue, was tried before Judge Deasy and I represented Mr. Tsang. Judge Deasy ruled that there was no obligation inuring to the benefit of Mr. Kan of any kind or character. There was no debt for unpaid salary. There was no debt for damages, for alleged breach of contract, and that Mr. Kan had no right to be restored to his former position, that it had been offered to him and that he had refused to accept it. From that Mr. Kan took an appeal to the Supreme Court of the State of California and that was in turn transferred to the District Court of Appeal and is waiting its turn to be reached. It will be some several months yet, I presume.

The Court: The reason I put you on today is because it is the only date I have for some time. [71]

Mr. Hatch: It would be of definite assistance if your Honor would rule on the sixth and seventh defenses at this time, because, as I have contended, if you rule with me, it will be disposing of this case

and we will not have to come back at a subsequent time.

The Court: We do not know what the Supreme Court may do. If it affirms Judge Deasy's opinion, we are engaged in an idle act here.

Mr. Hatch: I think so, but if we take advantage of the fact that the company has gone out of business, then we won't have to wait until the Supreme Court gets through with the case; and the desirability of that is that the partnership is in dissolution under the jurisdiction of Judge Foley. At the present time they are reserving a large sum of money in the receiver's hands awaiting the disposition of Mr. Kan's claim. If your Honor rules on that subject at this time, that can be reported to Judge Foley and we will eliminate one of the controversial issues now existing in the partnership.

The Court: But if those matters are all pending in the State Courts, I don't think I would be justified in going ahead with the case under the circumstances. I will not transfer the matter while it is pending in the State Courts.

Mr. Hatch: There must be something wrong with our system of jurisprudence when a man can have his day in court and because the ruling is adverse to him, he can walk two blocks to [72] the east and start all over again. That is not right.

The Court: I repeat, it goes to the very merits of this case. It was a question for decision by the Supreme Court, you say, is that right?

Mr. Hatch: I don't recall what you are referring to, your Honor.

The Court: You said this matter is pending in the Supreme Court on Judge Deasy's decision?

Mr. Hatch: Yes.

The Court: What was his decision?

Mr. Hatch: His decision was to the effect that no right exists in favor of Mr. Kan in respect to the partnership, or business, of any kind or character. He has, one, no right to be re-employed; two, he has no right for damages, and three, he has no right to back salary of any kind or character. That was Judge Deasy's decision.

The Court: I am prepared to make an order now. This matter will go off the calendar and will be restored after the Supreme Court disposes of this issue. To my mind, without going into any details and as far as we have discussed the matter, they go to the fundamental things that we are here concerned with, and I take it, if the Supreme Court affirms the decision of Judge Deasy, we won't have any difficulty here.

That is my present state of mind and if I am in error, you will have an opportunity to present it and we will restore the [73] case to the calendar after the matter has been disposed of in the Supreme Court.

Mr. Hatch: I would like to add this, for whatever purpose it may serve, in disposing of the issues between the parties, no matter what the formal issues are, there is no question but that if the case went to trial on the merits, the same testimony and same evidence would be offered precisely as was the case before Judge Deasy, so it would be a retrial no matter how you look at it. [74]

[Title of District Court and Cause.]

Wednesday, September 10, 1947

Appearances:

For Petitioner: Joseph Karesh, Esq., Assistant United States Attorney; Rudolph J. Scholz, Esq., Assistant United States Attorney.

For Respondent Ernest Tsang: Robert E. Hatch, Esq. [1\*]

The Clerk: Kan vs. Tsang.

Mr. Hatch: Respondent Tsang is ready.

Mr. Scholz: Ready for the petitioner.

Mr. Karesh: May it please your Honor, I have asked Mr. Scholz, who is handling this case on behalf of the veteran, to allow me to be associated with him, and for a particular reason, which I will now make known to the court.

There has been, as your Honor knows, a good deal said about a prior proceeding held in the State of California between the parties. It has always been the contention of the Government that the proceedings there are not *res adjudicata* as to the issues presented between the parties in this court, and your Honor so held. However, your Honor, it may be, and I say this with all respect to the court, that your Honor feels that since the court of the State of California has decided adversely to the petitioner, perhaps there is some merit in the respondent's contention.

I feel, your Honor, that had there not been offered in evidence in the State proceedings a copy of a

---

\* Page numbering appearing at top of page of original Reporter's Transcript of Record.

communication between Mr. Kan and the United States Attorney's Office, that the result might have been different, even in the State court. I showed that letter to Mr. Hatch as a basis of effecting a compromise; somehow, that letter got into the State proceeding. It is a confidential communication, if your Honor please, between the United States Attorney's office and Mr. Kan; it [2] should never have been received in the State proceeding. And I make the statement, your Honor, that had that letter not been there the result might have been different. So I respectfully ask your Honor, as I know your Honor will, not to take into account any decision or not to be swayed in any way by the decision of the Supreme Court or by the decision of the courts of the State of California. That letter, your Honor, never should have been received in evidence; it had nothing to do with the proceeding in the State court. And that letter that Mr. Kan addressed to our office never should have been received in evidence.

The Court: Is this an argument?

Mr. Karesh: No, it is my statement that the decision in the State court might have been different had that letter not been received in evidence.

The Court: The only way I can determine this case is from the records. So proceed.

Mr. Hatch: The statement of counsel is not evidence, but I do not want to be understood by my silence as agreeing with what counsel has said. I differ with his statement in its entirety.

Mr. Scholz: If your Honor please, I am representing the United States Attorney's Office. This is



a suit of John Kan, a veteran, against Ernest Tsang, a General Partner; L. M. Carter, George Chew, George Chin, Philip Fong, Fred Leong and Paul Yuke, Limited Partners, doing business under the [3] name of Cathay House.

The petition has been served and I have a statement signed by George Chin and Fred Leong, reading:

“We have carefully read the summons served upon us by the United States Attorney and wish to state that the contents of the complaint by John J. Kan are true. We are not desirous of contesting this case.

“GEORGE CHIN,  
“FRED LEONG.”

However, Ernest Tsang, the general partner, sued here, has filed an answer through Robert Hatch, as his attorney.

This is a petition under Section 8 of the Selective Training and Service Act of 1940 as amended. The jurisdiction of this court is based solely on that Act, and this court under that Act has the sole power to judge a matter of this kind. Under that Act the United States Attorney is obligated upon the request of any veteran to enforce his rights as to employment, if he left his employment during the war and entered into the armed service of the United States.

Referring now to the petition on file here, and the answer of John Chan through his attorney, Robert Hatch, paragraph 1 of the petition is admitted. That reads as follows:



“This is a petition under Section 8 of the Selective Training and Service Act of 1940 as amended, and the jurisdiction of this court is based on that Act.” [4]

Paragraph 2 of the petition is also admitted, to wit, that, “Petitioner is a resident of the City and County of San Francisco, State of California, residing at 1060 Powell Street thereof.”

Paragraph 3 is denied.

Paragraph 4 is admitted. If I am incorrect in anything, Mr. Hatch, will you interrupt me? That reads:

“That on or about the 23rd day of July, 1943, at San Francisco, California, petitioner was inducted into the military service of the United States, and thereupon entered into said service.”

Mr. Hatch: That is correct. I have only denied paragraphs 3, 5, 8 and 9, your Honor.

Mr. Scholz: All of the paragraphs are admitted and stipulated as admitted except paragraphs 3, 5, 8 and 9, is that correct, Mr. Hatch?

Mr. Hatch: Paragraphs 3, 5, 8, 9, and 10 are denied, your Honor.

Mr. Scholz: Unless you want to make a statement, I will proceed.

Mr. Hatch: Yes, I do. So that the record will be straight in this matter, I wish to call attention to the fact that there have been numerous hearings in the past. The first hearings were during the

time the action in the State court was still pending; I believe Judge Deasy had made his decision; [5] however, the case was up on appeal, and your Honor deferred this action awaiting the decision of the State Supreme Court for whatever enlightenment that might give without committing yourself. It was my argument at that time that the action was abated on the ground that there was another action pending involving the same matter.

At that time, at least on one occasion, if not two occasions, the plaintiff, through the United States Attorney, or by Judge Ames, or Mr. Romer, the attorneys in the State action for Mr. Kan, attempted to differentiate this proceeding from the State Court proceeding. The main argument that was made in that respect was that the State Court action involved the issue of damages and not the restitution of employment; that the GI feature, under the Federal proceeding, his right to restitution to employment was independent of his right to damages, and here was the question of money compensation and determination if Mr. Tsang should re-employ him. They argued at that time, which was shortly before October, 1946, that nonetheless this court should try merely the feature whether the man should be returned to his position, contending that the fact that the State court held that he was not entitled to any compensation by being deprived of his position, did not prevent your Honor from entertaining this feature of the case. Of course, the grievous error that was committed by counsel at that

time was that the articles of partnership of this Cathay House—under [6] the terms of the articles of partnership the company was formed for a period of three years beginning October 1, 1943—so that shortly after this argument was presented to your Honor the partnership terminated. They are asking for him to be restored to his job at \$750 a month. There is no Cathay House partnership in existence. They are asking that the petitioner, himself, be restored to his job in a company that does not exist. When that fact was brought to the attention of counsel, they made the argument, Now, we are in a position, if that is so, to ask for damages for loss of wages. That statement was made by Mr. Karesh at one of the recent sessions in this court.

Now, Mr. Scholz takes over and he says, "We want to go ahead on the complaint and petition." He does not tell your Honor what relief they are asking; he does not enlighten the court upon the issues. Not only was this partnership terminated by its articles of partnership subscribed to by Mr. Kan and the other partners, but Mr. Kan brought another action in the State court for the dissolution of the partnership. The State court took jurisdiction of that. Dissolution was granted last summer upon stipulation of counsel representing all of the partners and further upon the concerted action of the attorneys for the partners this place of business was put up for sale; and on August 30, 1946, there was a public sale of all of the assets of the partnership. At that time [7] Mr. Kan did bid; he was outbid by Mr. Tsang. There was competitive bidding

that went on for a period of an hour or two, and finally the property was knocked down and sold and a bill of sale of the business was given to Mr. Tsang. Mr. Kan filed no claim against the partnership in the receivership proceedings for his loss of wages or damages. That partnership has been wound up by the action and decree of the State court at the instance of Mr. Kan.

Now, we are still over a year in this court with what we might call a new complaint. They ask for restitution to a position which no longer exists. Now they do not say in the oral statement this morning what they are asking for by way of relief. If they are asking for money their remedy would have been to file a claim in the dissolution proceeding, and it would have been allowed there. Be that as it may, the State court proceeding specifically held that Kan sustained no damages. They have been going from one court to another court, and from one counsel to another counsel. No one makes the same contention. I do not know what I am defending at this time. It seems to me we have never disputed any question of fact.

The case went up on appeal to the State Supreme Court upon briefs, in which I pointed out that there was no conflict of facts. Here we are this morning starting anew, when it seems to me the orderly procedure is to bring the court's attention [8] to the fact that the partnership no longer exists, and I think that counsel should be directed at this time to state what relief it is they claim they are entitled

to. If it is limited to damages, then we have the finding of the State court.

Finally, I might say that it has never been the contention of the defendant and it is not the contention now, that the findings of the State court upon the questions of law, that any finding in that respect was binding upon your Honor. It is my contention that there has been an action between these men by Mr. Kan bringing the issues before the court by his affirmative cross-complaint, and those issues were between two men who were residents of the State of California. They chose that forum to raise the issues of fact. The trial court there determined the facts. Those facts are now binding upon these parties, and the judgment having become final, it is my contention that the judgment in the State court is binding upon the questions of fact, and taking those questions of fact as determined, that there is no question of law involved in this case. In other words, that the court, following the finding of the State Court that Mr. Kan, upon his return from his short sojourn in the Army, was offered his job back on the same basis that he had before the war, and that he undertook to consider it and then terminated it, all within the period of one year after he returned from service, and that at no time during that one-year period did he ever indicate that he was willing to [9] accept or return to his former job upon the same basis he had before; now, if those are the facts then there is no issue of law for this court to determine, because if he was offered that



job back and did not take it, and thereafter refused to take it, then this court could say, "Now, I will order you to go back and take this man to work." That would be so if the partnership were still in existence, but of course it is not in existence.

The Court: You may answer counsel.

Mr. Karesh: If your Honor please, there are two issues involved here. The first issue is the issue of fact, did the Cathay House offer Mr. Kan back his position? Mr. Kan denies it, and says it was offered back to him with certain conditions, conditions which under the law he did not have to meet. In other words, the Selective Training and Service Act, Section 8, says, when a veteran comes back from service he is entitled to his job back with no strings attached, and there were strings attached. Second, let us assume for example, as Mr. Hatch says, for the purpose of argument, that when Mr. Kan came back from the service he was offered his same salary, which was \$500 a month. Now, when he went into the service the other man, Mr. Tsang, who was likewise a manager along with Mr. Kan, was making \$500 a month. When Mr. Kan got out of the service Mr. Tsang was making \$750 a month. Therefore, your Honor, under the Selective Service Act, before it could be said that the Cathay House had offered Mr. Chan his job back, to fulfill the requirements of the Selective Service Act they would have had to have given him \$750 a month, because under the law a man is entitled to all of the increases in pay given while he was in the service. In other

words, your Honor, if I had a job as manager at \$500 a month before I went into the service and another man had a job at \$500 a month, and he did not go into the service, and he was likewise a manager, and when I came out of the service he was making \$1000 a month, I am entitled under the Selective Service Act to \$1000 a month. Otherwise, the requirement of the Act could not have been performed. So there are two issues, one, Was he offered this job back? and second, If he was, was the requirement of the Act fulfilled by offering only \$500 a month, the amount he was given when he went into the service, or should his salary have been likewise raised to \$750 a month, which Mr. Tsang had been raised to? Those are the issues of the case. We are not asking for re-employment. The Act says you are entitled not only to your job back for a year, but you are entitled to loss of wages. We are asking for one year's pay.

The Court: I have some other matters to take up. We will take a short recess.

(Recess.)

Mr. Hatch: Before counsel proceeds with the testimony, as I understand there is no claim for restitution, but his [11] claim is for one year's loss of wages. They do not say against whom. The only defendant before the court is Mr. Tsang. Is it possible that they contend that one of the partners is responsible for the bills of the partnership? Is there any dispute that the partnership is not in existence?

The Court: Answer that.



Mr. Karesh: There is \$100,000 in assets of the Cathay House in the hands of the receiver. We want twelve months at \$750 a month.

Mr. Hatch: From the receiver? I do not represent the receiver.

The Court: The only thing you need to do is to protect the record on both sides. I can see, very frankly, no matter what I may do, that some other court will have to review it. Proceed with that thought in mind. I want you both to have a record.

Mr. Hatch: I ask that the court at this time instruct the counsel for the plaintiff to state what it is that they are asking in the way of relief, and against whom.

The Court: You may state that, Mr. Karesh.

Mr. Karesh: The prayer reads, "Wherefore petitioner prays that the respondents be specifically required to comply with the provisions of the Selective Training and Service Act of 1940, as amended, and with the Service Extension Act of 1941, by reinstating the petitioner to the position of general manager [12] of the Cathay House and to compensate the petitioner for loss of wages and benefits suffered by reason of the respondents' unlawful action." That is 12 months' pay at \$750 a month that Chan is entitled to be recompensed as general manager. However the act additionally states, "In case any private employer fails or refuses to comply with the provisions of sub-section (b) or subsection (c) the District Court of the

United States for the district in which such private employer maintains a place of business shall have power, upon a filing of a motion or a petition, or other appropriate pleading by the person entitled to the benefits of such provisions to specifically require such employer to comply with such provisions and as an incident thereto to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action."

The Court: Is he satisfied with loss of wages?

Mr. Karesh: I would like to ask that question of Mr. Kan: You are satisfied if the Court will order your wages paid, you do not particularly care to work for the Cathay House?

Mr. Kan: I am satisfied.

Mr. Hatch: That is not an answer.

Mr. Karesh: We allege he is entitled to one year's wages, and whether he gets the job back, or not, we do not care.

The Court: Proceed.

Mr. Hatch: Now, I want to know who they are claiming this [13] loss of wages from. If he has closed his opening statement I now move for judgment in favor of the defendant Ernest Tsang upon the basis of the plaintiff's opening statement; accepting what they say to be true, although controverted by the defense, that they make out no case for this court to entertain, and in that respect I point out that the receiver of the partnership is not before the court. The court cannot order Mr. Kan to pay any money out of the partnership. If the

court should make an order against Mr. Tsang, Mr. Tsang would have no way of getting money out of the partnership. Now, if the relief is against the partnership, the only way that the court would get jurisdiction to require the payment would be to have the receiver before the court. I did not represent the receiver in respect to that proceeding in the receivership, and I therefor make that motion. If they are asking relief, if they want it from the partnership, then I move that the court continue this case until the receiver comes before the court. I have this to say to the court, it is not evidence, but during the past several weeks we have had numerous hearings before Judge Foley. I filed in that action a claim by Mr. Tsang against the receiver, and stated it to be a contingent claim, that if Mr. Tsang should be subject to a judgment in this case it would be because of his capacity with the partnership, and that that liability would be a liability of the partnership, not of Mr. Tsang individually. Of course, Mr. Tsang, as an individual, [14] never did employ Mr. Kan; and Judge Foley has ruled, although the order has not been entered, that that claim be disallowed. That places the matter where we are in a very unfortunate position. This proceeding is apparently against Mr. Tsang, individually, because I represent him individually only. They are proceeding upon the theory, according to Mr. Karesh, that there is \$100,000 in the receivership. I cannot get any part of the money out, and the only fair and sensible procedure would be that

if this action is against the receivership or the partnership, then that entity should be brought before the court. I have no power over that. I have done everything I could to protect Mr. Tsang in the event of a contingent liability, but the court over there has ruled that so far as he is concerned this is not a partnership or receivership matter, inasmuch as neither the partnership nor the receiver has been made a party to this action.

Now, I respectfully submit to your Honor I should not be put in the position of representing somebody I do not represent, and to include Mr. Tsang is exposing him to a liability on the theory that he is going to get it out of the receiver. I might say that when I presented this contingent claim to Judge Foley, Judge Ames, as one of the attorneys for Mr. Kan, opposed the allowance of that claim and said that the claim should be rejected. Now, Judge Ames does not appear here, and Mr. Romer, who is the other attorney for Mr. Kan, was not [15] present in the proceeding in the State court. You can see what I am up against, because every time I get another court counsel has a different contention. I am not wanting to waste the time of this court. It is perfectly obvious to me and I think it should be to everybody else, that we are not in a position to proceed today against the partnership, and up to this point counsel won't say who they are trying to collect this judgment from if they get it.

Mr. Scholz: Your Honor, the complaint specifically states what we are asking for. Ernest Tsang

is a General Partner, and the other partners are either fictitious or just on the surface limited partners. The limited partners were all served and they appeared and they do not want to contest this case, and they say the contents of the petition are true. A general partner has full control. A limited partner, as your Honor knows, is one who has a limited amount of assets; he has no control, absolutely no control of the business. He cannot tell what it shall do in any way. If it does, he becomes a general partner.

The Court: Counsel may proceed with the trial.

Mr. Hatch: It is understood by everybody that I do not represent the receiver, that I represent Ernest Tsang individually and not otherwise.

The Court: Proceed: You may renew your motion later.

Mr. Scholz: At this time I will offer a copy of a letter [16] signed by George Chin and Fred Leong.

Mr. Hatch: It is really not a matter of evidence, but I have no objection to it.

The Court: For the purpose of the record, what is it you are offering?

Mr. Scholz: It is merely a statement attached to a copy of the summons and complaint and states, "We have carefully read the summons served upon us by the United States Attorney and wish to state that the contents of the complaint by John J. Kan are true. We are not desirous of contesting this case." Signed, George Chin, Fred Leong. May 8, 1946.

The Court: It may be admitted and marked.

(The document was marked Plaintiff's Exhibit 1 in evidence.)

Mr. Scholz: I also have here a return on service of writ on George Chin and Fred Leong by the United States Marshal. May that be admitted and marked?

The Court: It may be admitted and marked.

(The return on service of writ was marked Plaintiff's Exhibit 2.)

JOHN J. KAN

called as a witness in behalf of petitioner; sworn.

The Clerk: Will you state your name to the court?

A. My name is John J. Kan.

Q. (By Mr. Scholz): You are the petitioner in this case? [17]

A. I am.

Q. You reside at 1060 Powell Street, San Francisco, California?

A. I do.

Q. At the time you filed this action, which was April 18, 1946, there was a partnership doing business under the name of Cathay House?

A. That is right.

Q. Do you know who the general partner was in that partnership?

A. The general partner was Ernest Tsang.

Q. There were also some limited partners?

A. That is right.

Q. The limited partners were L. M. Carter, George Chew, George Chin, Philip Fong, Fred



(Testimony of John J. Kan.)

A. That is what I understood. I have never seen the limited partnership papers.

Q. You have never seen either the original or a copy of the limited partnership papers?

A. No.

Q. This change took place, you said, while you were in the Army of the United States? [20]

A. Yes.

Q. Now, immediately prior to your entrance into the military service of the United States, you stated you were employed as general manager of the Cathay House, the corporation?

A. That is correct.

Q. What was your salary at that time?

A. My salary was \$500 per month.

Q. When you left this position as general manager at the salary of \$500 a month you left for the purpose of entering into the military service of the United States? A. I did.

Q. Did you satisfactorily complete your period of service in the armed service of the United States on the 25th of November, 1943?

A. I did, and I received an honorable discharge.

Mr. Scholz: We will offer in evidence, if your Honor please, a photostat of the honorable discharge of John J. Kan.

Mr. Hatch: We object to it as merely incumbering the record and being immaterial, irrelevant and incompetent. We do not dispute it. I think we are going to have a very voluminous record without any



(Testimony of John J. Kan.)

additional documents. It is only going to incumber the record. There is no denial in the pleading.

Mr. Scholz: That is correct, there is not.

The Court: Very well, proceed.

Q. (By Mr. Scholz): Now, you were discharged on the 25th of [21] November, 1943 and within 90 days after your relief from such armed service you made application to Ernest Tsang for restoration to the position that you had with the Cathay House prior to entry into the service of the United States?

Mr. Hatch: Before you answer that—To which I object on the ground that calls for an opinion and conclusion of the witness.

The Court: He can answer "Yes" or "No."

Mr. Hatch: Additionally, I object to it as being immaterial, for the reason that there is no foundation shown that Ernest Tsang, the only defendant in this case, was directed to—the question is not directed, and it would not elicit the fact that the job was asked of Ernest Tsang individually.

The Court: I will sustain the objection.

Mr. Scholz: I will clear the matter up.

Q. Within 90 days after you were released from the armed service you made application for restoration to the position you had occupied just prior to your entrance into the service of the United States?

A. I did.

Q. Whom did you make that application to?

A. I made that to Ernest Tsang.

(Testimony of John J. Kan.)

Q. And at that time what position did Ernest Tsang occupy with reference to the corporation, or the partnership?

Mr. Hatch: To that question I object on the ground it is [22] not within the issues of this case.

Mr. Scholz: There is testimony before the court that Tsang was the president and a general partner, and the only one who had any control of the general partnership was Ernest Tsang. The point is, under the Selective Service Act the veteran may make application within 90 days after his release. Now, we are proving by this witness that he did within 90 days make application to Ernest Tsang——

The Court: What was his position at that time, do you know?

Mr. Scholz: At that time—You may answer.

A. Mr. Tsang, as I understood, was the general partner of the Cathay House at that time.

Q. (By The Court): You understood. What are the facts? Do you know anything about it?

A. I was informed by my wife.

Mr. Scholz: You cannot testify to that. Do I understand that the court has ruled it is within the issues?

The Court: It may or may not become an issue. I will allow it subject to a motion to strike and over your objection.

Mr. Hatch: I will state to the court that Mr. Tsang was the sole general partner of the partnership during the life of that partnership; he was president of the corporation at the time that Mr. Kan

(Testimony of John J. Kan.)

was there before he left for service, and [23] continuously ever since, including the present time, and the basis of my objection is that we have only Mr. Tsang as an individual as a defendant in this case; if the partnership or the corporation were a party to this proceeding and I represented them I would not make the objection, but I have already tried to emphasize to the court I did not represent those entities. It therefore becomes a false issue, presenting to your Honor a responsibility of an employer who is not before the court, but should be before the court if they seek redress against him.

Mr. Scholz: Mr. Ernest Tsang was sued as a general partner. He is the only one who had any control over that partnership, and he certainly is before the court.

Mr. Hatch: What became of the receiver?

The Court: What is there before the court now?

Mr. Hatch: My objection to the question as to what capacity Mr. Tsang held at the time that this gentleman is talking about.

The Court: I will allow it subject to your motion to strike and over your objection.

Mr. Hatch: I now move to strike that evidence.

The Court: The motion will be denied at this time. We will take a recess.

(Recess)

Mr. Hatch: If your Honor please, I would now like to call [24] to your Honor's attention the fact of the receivership of which there was no formal

(Testimony of John J. Kan.)

proof. I would like to have the privilege accorded at this time to offer in evidence a record in the receivership proceedings. I do not have certified copies, but I will either have them or satisfy Mr. Scholz of the authenticity of my copies. Commencing with the complaint for dissolution in the Superior Court, No. 349,840, which suit was filed by Mr. Chan and two men in the Superior Court, together with the decree of distribution that was entered in that case, together with the order appointing a receiver, the order for the sale of the business, and the decree of dissolution, signed and filed in the court, and also a certificate that the receivership is still in force and effect; that the partnership is still under a receiver.

Mr. Scholz: If your Honor please, we will make the objection on the ground that it is not proper evidence, that it is not relevant or competent or material, because this action, as I view it, is directly against an individual. We are not concerned with anything else. This action is against an individual, and there have been case decided by other district courts that have held along that line. At the proper time we will file such authorities.

Mr. Hatch: I will call your Honor's attention to the fact that the petition in this case alleges that Kan was employed by the corporation and not by the partnership, the successor [25] in interest of the corporation. Nowhere in the pleadings is there any claim that Kan was ever employed by Mr. Tsang, an individual, or that Mr. Tsang was ever the successor

(Testimony of John J. Kan.)

of the employer. It would seem to me that we are still before the court with no pleading against any employer.

Mr. Scholz: I do not think that is quite a correct statement.

Mr. Hatch: There is no pleading here—let us say they have a claim against the partnership; that would be a matter for the receivership. There is no assertion in any pleading that Mr. Tsang is a successor in interest.

Mr. Scholz: Mr. Hatch will have an opportunity later. I suggest that we get through with this witness.

The Court: Proceed.

Q. (By Mr. Scholz): Mr. Kan, what was the Cathay House, what sort of business was that?

Mr. Hatch: We will stipulate it was a restaurant at the corner of California and Grant Avenue, and that has been its only activity at any time.

Mr. Karesh: It has a liquor license and a bar?

Mr. Hatch: It has a liquor license, but no bar. It has a service bar.

Mr. Scholz: Now, how did this Cathay House, the restaurant, come into existence?

A. Well, it goes back quite a ways. Dr. Theodore Lee approached me—— [26]

Mr. Hatch: I will object to this as immaterial.

Mr. Scholz: It is just preliminary.

Mr. Hatch: As a matter of information to the court, I will state Mr. Kan and Dr. Theodore Lee

(Testimony of John J. Kan.)

formed this restaurant, formed the restaurant, and that Ernest Tsang came in briefly after its origin; that stock was issued to Tsang. Dr. Lee sold out and Mr. Tsang put additional money in, bought additional stock, and by the time that Mr. Kan went into the service that Mr. Tsang was the majority stockholder.

Mr. Scholz: And will you stipulate that Kan held a comparative position to that of Mr. Tsang?

Mr. Hatch: There is no doubt that Mr. Kan held a comparative position.

Mr. Karesh: Is that stipulated?

Mr. Hatch: Yes.

Mr. Scholz: Is it also stipulated that the position held by Mr. Kan was not a temporary position and was not just only for a short period of time?

Mr. Hatch: That is right. In other words, he was on a temporary unrestricted basis and had been there since the inception.

Mr. Scholz: You say temporary?

Mr. Hatch: He was employed by the corporation since its inception, but of course he had no contract. The corporation had a legal right to discharge him at any time, as it could discharge any other employee.

Mr. Scholz: That is correct. The only point I had was [27] that it was not merely for a day or two.

Mr. Hatch: He had held the job for a period of years.

Mr. Karesh: You mean as a regular employee.

Mr. Hatch: As a regular employee.

Mr. Karesh: Is that stipulated?

Mr. Hatch: Yes.



(Testimony of John J. Kan.)

Mr. Karesh: Since the inception of the Cathay House in 1939?

Mr. Hatch: Correct.

Mr. Scholz: Up to the time he left for the service?

Mr. Hatch: Yes.

Mr. Scholz: That eliminates all that.

Q. What were your duties with the Cathay House?

A. My duties as general manager were to take care of buying or purchasing all supplies, setting up the system of operations, taking care of the advertising, making up the menus, making any change that had anything to do with the operation of the restaurant.

Q. What were Mr. Tsang's duties at that time?

A. Mr. Tsang's duties were mostly taking care of the cash, the banking, and purchasing of liquor. Occasionally he helped on the floor in the business.

Q. For the purpose of the record, that was started by you and Dr Lee about October, 1939?

A. It was started around July, 1939, but the actual opening of [28] Cathay House was October 7, 1939.

Mr. Scholz: The corporation was incorporated on September 28, 1939, is that stipulated?

Mr. Hatch: Yes.

Q. (By Mr. Scholz): The Cathay House was very successful, was it not?

A. It was.



(Testimony of John J. Kan.)

Q. And it made over \$200,000?

A. I think in excess of \$200,000.

Q. By that I do not mean gross profit. Was that net or gross?

A. That is net profit.

Q. They have now assets of \$100,000 or more?

A. It had assets of over \$200,000 in cash alone in August, 1946.

Q. Now, what was Tsang's official position at the time you left for the service, United States Service, by that I mean outside of president, was he, if I may lead you, was he a co-manager?

A. Yes, he was.

Q. With you?           A. Yes.

Mr. Hatch: I have no objection to it except it clutters up the record.

Mr. Scholz: Is it stipulated that John Kan and Ernest Tsang were co-general managers at the time he left for the service in the United States Army?

Mr. Hatch: That he acted as such without any title. [29]

Mr. Karesh: The stationery shows a title.

Mr. Hatch: The letterhead shows the name of two individuals without any title. I don't know that any official titles were ever granted by the corporation.

Mr. Scholz: I am going to offer this in evidence as soon as I lay the foundation.

Q. Mr. Kan, I hand you herewith a business card and also a letterhead on which is written "Cathay House," and on the letterhead is "John J. Kan and

(Testimony of John J. Kan.)

Ernest Tsang," and on the card is "John J. Kan, General Manager," and ask you if Mr. Tsang was familiar with this stationery.

A. Yes, Mr. Tsang was familiar with the stationery; he also used the same stationery, and at the time these cards were printed there were some printed for Mr. Tsang, so that the stationery would all be uniform.

Q. In other words, then, as I understand the letterhead was used by Mr. Tsang and yourself, and the card was used by Mr. Tsang and by yourself and instead of where "John J. Kan, General Manager" is written Mr. Tsang had his name there?

A. That is correct.

Mr. Scholz: I offer this in evidence.

The Court: It may be admitted and marked.

(The card and letterhead were marked Plaintiff's Exhibit 4 in evidence.)

Q. (By Mr. Scholz): Now, at the time or just prior to your [30] induction into the military service of the United States what was Mr. Tsang's salary?

A. At the time I was inducted into the Army Mr. Tsang's salary was \$500 a month; it was the same as mine.

Q. Now, upon your return from the Army and within 90 days after you were discharged from the Army, you have already stated that you asked Mr. Tsang for a return of your position. What was Mr. Tsang's salary at that time?

A. Mr. Tsang's salary at the time I first saw him after my return, after my discharge there——

(Testimony of John J. Kan.)

The Court: Fix the time as near as you can.

Mr. Scholz: Fix the time.

A. That was December 4, 1943; that was my first day in town after I was discharged. His salary at that time, as I understand, was \$750 a month.

Mr. Hatch: From the partnership, we so stipulate.

Mr. Scholz: So stipulated.

Q. Now, did Mr. Tsang refuse or decline to re-employ you and restore you to the position which you had prior to your entrance into the military service of the United States? If that is not clear, I will reframe it. You have already testified that you saw Mr. Tsang about being re-employed, did you not?

A. That is right.

Q. And you have already testified that that was about December 4, 1943? [31]

A. 1943.

Q. At that time did you ask Mr. Tsang to be restored to the position that you formerly occupied before your entrance into the military service?

A. Yes, I did.

Q. Did he refuse to re-employ you upon the same terms and conditions?

A. Not on that day, no.

Q. What happened on that day?

A. When I first arrived in town I reported to my draft board and then I went to see Mr. Tsang at the Cathay House, and I told him I was discharged and I wanted to come back to work at the Cathay House, and Mr. Tsang told me it was now a

(Testimony of John J. Kan.)

limited partnership and under those conditions I could not be re-employed. However, he made an appointment for luncheon, to discuss that matter, and we did have a meeting, I believe, on December 15, 1943, and discussed my coming back to work.

Q. Now, what happened at that December 15, 1943 meeting with Mr. Tsang?

A. As I recall we had lunch at the Fishermen's Grotto at Fisherman's Wharf, with Mr. Tsang.

Q. Was there anybody else present besides you two?

A. No, there was no one besides Mr. Tsang and myself. I asked Mr. Tsang at that time why he had not informed me of the change-over from the corporation to a limited partnership, and [32] why he *had written* me, because he had told me before I left if there were any major changes made in the operation of the company he would so inform me. Mr. Tsang said, well, he was not very good at writing, and he was quite sure I would have approved of the change-over. And I told Mr. Tsang I did not care particularly if he was the general partner and operated the business as such provided I would receive my old position back. I told him I knew that he was employed by the partnership under a contract of \$750 a month, and I would be quite willing to go back to work at \$750 a month, receiving the same salary as he, because we had an oral agreement that our salaries would always be equal. Mr. Tsang said then that he personally was in favor of my receiving the

(Testimony of John J. Kan.)

same salary as himself, which was \$750 a month, but he wanted to discuss it with his business partner, Mr. George Chew when Mr. Chew would return from out of town. On about December 18 I again went to the Cathay House and saw Mr. Tsang, and asked him whether he had seen Mr. Chew, and Mr. Tsang said that he was not able to get in touch with him. I again told him that I was quite anxious to come back to work at the Cathay House. Mr. Tsang seemed very irritated about my presence and refused to discuss the matter any further. This went on for a time. I went back again to the Cathay House three or four times after that, and tried to get Mr. Tsang to talk about my return, but each time he would procrastinate, and said he wanted more time to think things over, [33] and finally Mr. Tsang told me on one of those occasions to go out and look for a job somewhere else, to which I responded I was one of the founders of the company and I did not see any reason why I should go out and look for a job somewhere else, because I was already a partner in the restaurant.

Then around January 18 I believe I went back to see Mr. Tsang again, and I told him our funds were getting very low, that we had spent most of our savings when I was in service, and my wife was not making very much, and I said I would like to get some guarantee about my return to my position. Mr. Tsang then refused to show me his contract of employment with the partnership; he said he did not

(Testimony of John J. Kan.)

know where it was; he said he did not know where the limited partnership papers were.

Finally, we agreed that we would meet in Mr. Hatch's office, because Mr. Tsang said, "Now, even if I take you back, are you willing to go down to my attorney's office to see what he has to say about it?" So we did arrange a meeting on January 20th to be held at Mr. Hatch's office.

Q. January 20th?

A. Yes, 1944. Present at that meeting were Mr. George Chew, Mr. Tsang, Mr. Hatch, and myself. Mr. Hatch did most of the talking that day. He explained to me that prior to my entry in the Army I was co-manager with Mr. Tsang in the Cathay House, and now it was a limited partnership, and he said, "I advised Mr. Tsang not to re-employ you, because a limited partner cannot [34] be active. Of course, you also know Mr. Tsang is in the driver's seat, but in order for you to go back to your position there are certain papers you must sign to get your job back." Those conditions were first to sign over all my stock to my wife; second, I was to sign a release to all claims of every nature, and, third, I was to sign a contract of employment. I did not quite get it clear. After that discussion I told Mr. Hatch if I have to sign any kind of papers to get my job back I certainly would like to have my attorney present, so we could all agree upon what was to go into the contract and the release. So another meeting was arranged whereby my attorney, Mr. Romer, could be present, and that was to be



(Testimony of John J. Kan.)

held on January 24, 1944. The same people were present, except with the addition of Mr. Romer. At that time Mr. Hatch denied that there was any discussion of any contract of employment, which I was led to believe I was to have because of the fact that I felt that if there was——

Q. Just what he said.

A. Mr. Hatch and I had never discussed the contract of employment before Mr. Romer. I did not think it was much protection for me to go back to work.

Q. Did Mr. Hatch say anything else that he wanted you to sign over at that time, anything about a release of any kind?

A. Well, on January 20th he wanted me to sign——

Q. I am talking about January 24th. [35]

A. He did discuss a release at that time, on January 24th, but being that I felt there was no protection for me whatsoever if I signed over all my stock and signed a release and signed away all my rights, which I had under Selective Service, I wanted a contract of employment such as Mr. Tsang had. So finally Mr. Romer suggested why didn't I go back to work without signing any papers of any sort, "Why don't you go back to work?" And then finally Mr. Romer suggested that Mr. Tsang and I had known each other all these years, "Why don't you get together and discuss it without the presence of attorneys?" And that was the crux of that meeting, and it was finally decided that Mr. Tsang and I would discuss it ourselves.

(Testimony of John J. Kan.)

Q. At any of these meetings up to and including January 24, was \$750 offered you at any time?

A. No.

Q. Now, you said that meeting terminated on January 24 that you and Tsang were to get together on another meeting. A. That is correct.

Q. Did you do so?

A. Yes, I did go back to see Mr. Tsang.

Q. How long after January 24, 1944 was that meeting?

A. I don't remember the exact date, but I think it was about a week after that I went to the Cathay House to see Mr. Tsang.

Q. Was there anybody else there besides you and Mr. Tsang that day? [36]

A. No, just Mr. Tsang and myself, and he seemed to be agreeable to my coming back to work, and also that he would give me a contract of employment such as he had. However, he said, "I do not think this can be final until I think about it further," so a few days later when I did go back I asked for my job at \$500 a month again.

Q. Just a minute. At that meeting shortly after January 24th you say that Mr. Tsang was apparently in a friendly mood and agreed to give you a contract of employment? A. Yes.

Q. Was there any condition attached to that? Did he state that you would have to do any particular thing?

A. No, there was not. It was a very short meeting.

(Testimony of John J. Kan.)

Q. Was anything finally decided?

A. I was led to believe at that meeting that I was ready to go back to work.

Mr. Hatch: Is that the meeting of January 24?

Mr. Scholz: No, it was shortly after that.

The Court: The week following the 24th, approximately?

Mr. Scholz: That was the week following?

A. About a week following January 24, and I thought that I was ready to go back to work. Then a few days later when I did go back to see Mr. Tsang he was very arrogant and said he did not want to talk about the matter, and just walked away, and I walked out; he didn't want me to come up to the Cathay [37] House and be there any more.

Q. What did he say and do at that meeting?

A. I told him at that time that I was ready to go back to work—I said, “Now, we are going to get together on this, I am willing to go back at \$500 a month.” And he said, “Well, I thought one time things would work out but it won't work out now,” and he just walked away.

Q. He refused to discuss it?

A. He refused to discuss it.

Q. Did that terminate your endeavor to have Tsang re-employ you?      A. It did.

Q. As far as you were concerned?

A. That is right.

Q. What did you do next about re-employment? Did you go to the Selective Service or any place else?

(Testimony of John J. Kan.)

A. I conferred with Mr. Romer and told him what had transpired in my discussion with Mr. Tsang, and finally we did make application to the Selective Service to hear the case. The draft board, I believe, received a letter from me with all of the details.

Mr. Karesh: About when?

A. I believe that was—I have the letter right here, a copy of the letter, if you wish to see it.

Q. That was shortly thereafter?

A. It was about a month or two later. I understand that the [38] draft board was unable to make a decision on it, and they sent it to Sacramento, and it laid up there for almost a year, and no action was taken.

Q. (By Mr. Scholz): Then the United States Attorney's Office contacted you?

A. I finally contacted Mr. Karesh and told Mr. Karesh about the case.

Q. Going back to Mr. Tsang, of the assets still remaining in this limited partnership, approximately what does he own of that?

Mr. Hatch: I will suggest a stipulation in that regard. It is a fact and I know it to be a fact that the partnership has persisted in the same form, amounts of interest, since the time of the filing of the suit, and these are shown in the articles of partnership.

The Court: What percentage does he have?

Mr. Hatch: In the corporation the total capitalization was 9700 shares of capital stock as of the

(Testimony of John J. Kan.)

time Kan went into the service. The stockholders and the amount of stock held at that time is as follows: Ernest Tsang, 5300 shares; L. M. Carter, 100 shares; Paul Yuke, 100 shares; George Chew, 1500 shares; John J. Kan, 1000 shares; Helen Chan, his wife, 100 shares; Philip Fong, 1000 shares; Fred Leong, 400 shares; George Chin, 200 shares, a total of 9700 shares.

When the partnership was formed it was formed upon the same basis of association as to the limited partners, and there [39] have been some minor changes, some sales or exchanges of interest, and the interest of Mr. Tsang has remained and now is 5300 out of 9700, and Mr. Kan and his wife's interest remains the same at 1100 shares out of 9700. These proportions were determined according to the amount of money each one contributed. After the taking over of the capital stock of the corporation George Chew's stock belonged to Frank B. Wong, it did not belong to Mr. Tsang; he had no control over that stock whatsoever. He had no control over the Frank B. Wong stock.

Mr. Karesh: How about the other stock? How about Mr. L. M. Carter's stock?

Mr. Hatch: L. M. Carter is a Government employee, and Luke, and whether or not they and one or two of the other minor shareholders are dummies, let us say, for Mr. Tsang makes little difference, because in his own name Mr. Tsang owns a preponderance of the stock. Now, Fred Leong and

(Testimony of John J. Kan.)

George Chin are friends of Mr. Kan; I do not know whether he controls them, or not; I think it is immaterial. I know that they joined with him in the dissolution proceedings.

Mr. Karesh: Isn't it true that Mr. Tsang has bought the business—they bought it for about \$25,100?

Mr. Hatch: Yes, I think Mr. Kan's bid was 24,900 and he refused to go any higher, and Mr. Tsang bought it.

The Witness: You did the bidding against me.

Mr. Hatch: Yes, I was acting as Mr. Tsang's representative. [40]

The Witness: You had the lease, and that is why I did not bid higher.

Mr. Hatch: I was acting as the attorney and representative of Mr. Tsang in the bidding, and our bid was \$25,100 for the assets of the Cathay House, save the money in bank or accounts receivable. Judge Ames, on the other hand, started the bidding for Mr. Kan and later Mr. Kan took on and made his own bid. Each party put in probably two dozen bids, jumping up one hundred or two hundred at a time.

Mr. Karesh: That is stipulated?

Mr. Hatch: That is stipulated.

The Court: We will take a recess until two o'clock.

(A recess was thereupon taken until two o'clock p.m.) [41]



## Afternoon Session

September 10, 1947, 2:00 P.M.

The Court: You may proceed, gentlemen.

Mr. Hatch: Concerning the stipulation that I was making in response to the question asked by counsel, which was interrupted by the noon recess, since the date of the sale on August 30th of last year, when Mr. Tsang was the successful bidder, the business has been run as a partnership between Mr. Tsang, Frank Bing Wong, and Philip Fong.

Also that in relation to the dissolution proceedings in which the sale was made, Mr. Kan and his wife have the same interest as they had in the partnership, namely, 1100 out of 9700. So when they talk about the amount of money that is over there in the dissolution proceeding to be divided up, he is getting his share. I trust that the comment of counsel this morning as to this fund to be divided up is not suggested to your Honor in the view that it would influence your Honor in the decision of this case upon the merits. Mr. Kan has participated in the benefits of the building up of the partnership business just the same as all of the other partners.

Mr. Karesh: You mean up to the time of dissolution. He did not participate in the new business?

Mr. Hatch: He has no interest in the business since the sale on August 30th of the physical assets, consisting of the stock in trade, furniture, etc. [42]

Mr. Karesh: And the lease?

Mr. Hatch: Not the lease.

Mr. Karesh: The liquor license?

Mr. Hatch: The liquor license.

Mr. Karesh: Isn't it true that Frank B. Wong owns the property?

Mr. Hatch: He does not. The premises belong to the Musto family.

Mr. Karesh: Isn't it true that the owner of the premises would not lease the premises to Kan?

Mr. Hatch: The building has belonged for many years to the Musto family, and has been leased for all these years to the Wong Chung Company, an exporting and importing firm, which in later years contracted for the use of the lower floor. At the time the Cathay House was started the upper two floors were rented by the Wong Chung Company to the Cathay House. Following numerous disputes between the Wong Chung Company and Mr. Kan the exporting company was no longer willing to rent the premises or lease the premises to any concern in which Mr. Kan had any interest.

Q. (By Mr. Karesh): Then it is true that any bid that might have been made by Kan would have been an idle act, because he could not have got the premises anyway?

Mr. Hatch: That would be difficult for me to answer. That was my opinion at the time and is my opinion at this time. [43] However, Mr. Kan's theory was that the lease was an asset of the partnership acquired by Mr. Kan while he was the agent of the partnership, and therefore he held it in a

fiduciary capacity, and he bid up to just under \$25,000 on that theory, that he could enforce it, I guess, and then did not want to go any higher.

Mr. Scholz: Mr. Hatch, as I understand it, Mr. Tsang bid in and purchased the Cathay House.

Mr. Hatch: He was the sole purchaser.

Mr. Scholz: And it is now being operated as a partnership in which Mr. Kan has no interest?

Mr. Hatch: That is correct.

Mr. Scholz: And also I think, Mr. Hatch, that you stipulated to this, that the partnership was formed while Mr. Kan was in the Army, because you advised it for tax purposes?

Mr. Hatch: The facts in that regard are that the corporation was making a profit of in the neighborhood of \$60,000 a year. That was during the period when we had excess profits taxes. The tax rate of corporations was 95 per cent, and in order to minimize that I advised that they operate as a partnership, and I drew up the articles of partnership. Mr. Kan was away, but his wife had his power of attorney. Mrs. Kan took the document to Mr. Sidney Romer, who was the attorney for Mr. and Mrs. Kan, and Mr. Romer approved the document, whereupon Mrs. Kan signed her husband's name and her name.

Mr. Scholz: I asked you if you could stipulate to that [44] point, Mr. Hatch.

Mr. Hatch: I will not make a partial stipulation, because if I did it would only be part of the truth.

Mr. Scholz: That is all I wanted to know.

Mr. Scholz: Will you stipulate that prior to Mr. Kan leaving Mr. Tsang was receiving \$500 a month?

Mr. Hatch: There is no dispute about that; prior to Kan's leaving Tsang was receiving \$500 a month, and after Mr. Kan left Mr. Tsang's salary was raised to \$750 a month, and remained such until the end of the partnership.

Mr. Scholz: Will you take the stand, Mr. Kan?

JOHN J. KAN

recalled;

Direct Examination  
(Resumed)

By Mr. Scholz:

Q. Mr. Kan, on your return from the service in the armed forces of the United States, it has been stipulated Mr. Tsang was still acting as general manager or as one of the two general managers.

A. I believe he was acting in the capacity of manager.

Q. Was there anybody else occupying the position that you had when you left for service?

A. Not occupying it under that title.

Q. Was there anybody else in there doing the same kind of work that you did?

A. Yes, there was a man on the floor, and I believe there was [45] another girl who was employed; there were two.

Mr. Scholz: I think that is all.

Mr. Karesh: Have you stated what the duties of the new man were?

(Testimony of John J. Kan.)

A. Yes, the duties of the new man were to act as a host to seat the people, to supervise.

Q. Was it similar to the job you performed?

A. It was in a way similar.

Q. At any time have you been offered the position as one of the general managers since your return from the service of the Cathay House?

A. No.

Mr. Karesh: That is all.

### Cross-Examination

By Mr. Hatch:

Q. Mr. Kan, is it true, is it not, that the Cathay House at the beginning was operated as a corporation?  
A. Yes.

Q. It operated as a corporation up to October 1, 1943?  
A. I think that is true.

Q. And from October 1, 1943 up to October 1, 1946 it operated as a limited partnership?

A. That is true.

Q. And it is true that none of the times was Mr. Tsang the operator of the business in his own name?

A. That I don't know, because I never seen the limited partnership [46] papers.

Q. Do you know of any time when Mr. Tsang was the sole proprietor and owner of the business?

A. No.

Q. You were the person who filed the suit in the Superior Court for the dissolution of the partnership, were you not?

(Testimony of John J. Kan.)

Mr. Scholz: I object to that on the ground it is immaterial, irrelevant, and incompetent.

The Court: The objection is overruled.

A. Yes.

Q. (By Mr. Hatch): And in that connection you have been continuously represented from the inception until the present time by Judge Ames and Mr. Sidney Romer, who is here in court? A. Yes.

Mr. Scholz: Just a moment. In our view this entire line of interrogation is beside the issue. I do not want to keep interrupting by objecting to the questions, so may it be stipulated, if your Honor please, that my objection goes to this entire line of questioning?

The Court: The record may so show.

Mr. Hatch: That is agreeable.

Q. It is a fact, is it not, that you brought this matter of the restitution of your position to the office of the United States Attorney long before you brought the suit for dissolution?

A. That is right.

Q. It is also a fact that at the time when you first brought [47] the matter to the attention of the United States Attorney and the Selective Service organization, that that was before you filed your cross-complaint in the action that was tried before Judge Deasy? A. Yes.

Q. So that you were aware at the time that you embarked on your litigation in the State Court that there was a Federal phase to the problem?

A. That is right.



(Testimony of John J. Kan.)

Q. It is true, is it not, that while you were in the Army your wife had a general power of attorney from you? A. That is right.

Q. And she remained in San Francisco during the time you were away? A. That is right.

Q. And she worked at the Cathay House as an employee? A. That is right.

Q. It is your understanding, is it not, that whatever assets there are pending in the receivership you are to receive your share of the distribution?

A. As I understand.

Q. And that by stipulation there has been a partial distribution of the sum of \$100,000?

A. That is correct.

Q. And you received 10/97ths of that? [48]

A. That is correct.

Q. That is during the pendency of litigation here? A. Yes.

Q. You also since the expiration of the corporation activities on one or two occasions received 100 per cent dividend from the operations of the partnership? A. I do not recall right off-hand.

Q. You got at least one?

A. I received one dividend.

Q. Were you aware up to this time that in the dissolution proceedings that Jude Foley had made an order prescribing the time within which any claim must be filed against the receiver?

Mr. Scholz: If your Honor please, we object to any questions as to the receivership, because we do

(Testimony of John J. Kan.)

not think it is part of the case; it is immaterial, irrelevant, and incompetent, and has nothing to do with the case. May it be stipulated that our objection will go to the interrogation?

The Court: For the purpose of the record, indicate the purpose of the offer.

Mr. Hatch: The purpose of the offer is this, if this is a claim as stated by counsel, that if successful it would be paid out of the partnership fund in receivership assets, then, of course, he should have presented a claim there instead of prosecuting this action against Mr. Tsang as an individual when he, Kan, had an opportunity to present his claim to the receiver [49] and bring the receiver before the court.

Mr. Karesh: Isn't it true that since the suit is pending that the Superior Court did not order a complete dissolution?

Mr. Hatch: I do not think so. Judge Foley has very definitely indicated in his opinion the contrary.

The Court: For the limited purpose of the offer I will allow it.

Q. (By Mr. Hatch): Were you aware that Judge Foley fixed a time limit within which all claims could be filed against the receivership?

Mr. Scholz: Objected to as incompetent, irrelevant and incompetent, and nothing to do with the case. May it be stipulated that any interrogation as to the receivership the same objection is made?

Mr. Hatch: We have that understanding.

A. Will you ask that question again?

(Testimony of John J. Kan.)

Q. Did you know that Judge Foley made an order that all claims against the receivership would have to be filed on or before a certain date, and as a result of that you did file a claim over there?

A. No; most of the claims were filed through Mr. Romer.

Q. You filed no claim, however, against the receiver or the partnership with respect to any damages for non-employment?

A. That I don't know.

Q. You don't know that you filed any? [50]

A. No.

Mr. Hatch: Now, I would like to know what we are going to do about these voluminous records. Counsel indicated in open court sometime before the possibility of stipulating that they be read, but he wanted, however, to have Mr. Kan's personal testimony. Now, I had the testimony of Mr. Kan taken on numerous occasions, the deposition before suit was filed in the State court, also his testimony before Judge Deasy. I wish to bring before the court now in proper form that evidence, to show that the testimony that he has given today is in conflict with the testimony he gave at that time, and that he did not recall upon these early occasions, when his recollection should have been fresh, he did not recall the things he testified to at the present time. The only way I can accomplish that is to either have the court receive those documents in toto, or to read them in toto, because that is the only way I can prove a negative.

(Testimony of John J. Kan.)

Mr. Karesh: I am going to say this, you have gone along without laying any foundation for the purpose of impeachment. You will have to ask him those questions, or otherwise we will ask that the witness be permitted to step down from the stand.

The Court: Have you got the transcript you refer to here?

Mr. Hatch: Yes.

The Court: State the purpose for the record.

Mr. Hatch: My purpose is to prove that this gentleman did not [51] recall on those occasions the things that he testified to now; in other words, I am attempting to prove the negative; the only way I can do that is not to find something in there he did testify to, but read the entire transcript to show that he did not recall any of them. This is the only way I can prove that. My offer is to show that on previous occasions Mr. Kan did not testify to what he testified to today, and that he was interrogated upon those subjects.

The Court: Lay the foundation for that.

Q. (By Mr. Hatch): You remember, Mr. Kan, that your deposition was taken in my office prior to the trial before Judge Deasy? A. Yes.

Mr. Scholz: If your Honor please, I believe that the witness has a right to be shown the document in question.

Mr. Hatch: Yes, he is entitled to it. The deposition was taken on January 3, 1945, and January 11, 1945.

A. I don't remember the dates. I remember there were several depositions taken.

(Testimony of John J. Kan.)

Mr. Hatch: I do not have a certified copy of that document, and I do not think the Federal Rules permit proving it by certification. The only way, unless there is an admission, would be by having the reporter who took that deposition come out and testify. I will state to the court this is a true copy of the deposition that was taken at that time and place and was acknowledged before Notary Public Alfred D. Martin. [52] I will offer that in evidence, if your Honor please, to show the detail of the story as given by the witness as to what transpired in the partnership with Mr. Tsang before then and what transpired in conversations with Mr. Tsang after that, and that that detail was not related at the time that he was interrogated upon those subjects.

Mr. Karesh: May I make this observation. Counsel had a full opportunity to take the deposition of Mr. Kan. He cannot use a deposition in the State court for the purpose of impeachment; he will have to ask the witness if he specifically said that, and give him a chance to explain his answer, and we object to the offer of that particular deposition in evidence.

The Court: You will have to lay a foundation for that and interrogate the witness.

Mr. Hatch: I might make this statement, the fact that this deposition was taken in the State court, or otherwise, neither adds to nor subtracts from the value of this as evidence, and if it is a document which is subscribed by the witness and is contradictory to his present testimony it may be received.

(Testimony of John J. Kan.)

Mr. Karesh: We object to the deposition. As I stated, you cannot read that into the record.

Mr. Hatch: The only way I can show to your Honor that he did not testify about recalling that which he now says he does is to read the testimony in its entirety.

Mr. Karesh: That is improper cross-examination, for the [53] purpose of impeachment.

The Court: Proceed. If it is necessary to do so it will be done.

Mr. Scholz: Your Honor has ruled on that three times.

The Court: Let us proceed.

Mr. Karesh: I ask that you ask the question and see whether he said a particular thing, and give him a chance to explain.

Mr. Hatch: We will be here a long time if you insist on that. I would make this suggestion, because it was apparently agreeable to Mr. Karesh before, that the document be received in evidence and your Honor defer ruling as your Honor made a ruling on my motion for nonsuit.

The Court: It may be if you renew that offer at the proper time I will allow it, but the foundation has not been laid for the admission of it now.

Mr. Hatch: The only way I can prove this is by the testimony of the reporter.

Mr. Karesh: The reporter cannot add anything to the transcript. The only proper way to do is to ask him did he say this, and give him a chance to explain.



(Testimony of John J. Kan.)

Mr. Hatch: I would prefer to characterize it in relation to proving the facts rather than impeachment.

The Court: The only thing the court is concerned with here is seeking the truth.

Mr. Hatch: That is the only basis upon which we offer evidence, your Honor.

The Court: Proceed.

Q. (By Mr. Hatch): Have you glanced through that testimony? A. Yes, I have.

Q. Those are the answers you gave to those questions? A. I imagine so.

Mr. Scholz: If he is offering it now for the purpose of impeachment, we object to it. I think since the witness is here present the direct question should be asked of him.

The Court: What is before the court now?

Mr. Scholz: The question whether he gave that testimony, or not.

Mr. Hatch: I think he has.

Q. I would like to direct your attention to the transcript, beginning on page 80, and ask that you familiarize yourself either now or at your convenience as to whether those are the answers given in response to those questions. [57]

A. Page 80?

Mr. Hatch: I think that is the beginning of his testimony.

The Court: Let him read the question and answers on that particular page.

(Testimony of John J. Kan.)

Q. (By Mr. Hatch): Are those the answers you gave to those questions? A. Yes.

Mr. Karesh: Let the court know what they were.

The Court: If there is any objection you have to make, wait until the question is propounded.

Mr. Karesh: The objection is that he has not laid the proper foundation to read the question to the court.

The Court: Give him an opportunity to do that. Maybe he will do that. There is nothing before the court to object to.

Mr. Hatch: At this time I offer in evidence as defendant's exhibit the document which the witness has identified as containing his answers to the questions.

The Court: The objection will be sustained to them.

Mr. Hatch: First was the deposition. And I make the same offer in reference to the transcript.

Mr. Karesh: The same objection.

The Court: The same ruling.

Mr. Hatch: I have no further questions.

Mr. Scholz: If your Honor please, I offer in evidence as part of the petitioner's case a letter written on the stationery [58] of the stationery of the Cathay House, similar to the stationery heretofore introduced in evidence, except that the name John J. Kan is stricken out and it is dated February 1, 1946. I will read it:

(Testimony of John J. Kan.)

“To the Members of the Cathay House, a Limited Partnership:

“I have deferred writing this letter for a long time, waiting first to be sure that I am doing the fair thing. As you know, the partnership has been operating under a sublease to me. One of the partners admittedly went to the landlord a while back and tried to get a lease to the restaurant running in his own name, undoubtedly with the intention of throwing the rest of us out. The landlord refused this request and insists that he will rent only to me.

“During the past several years certain of the partners have done everything within their power to destroy the business and generally to make trouble. This has resulted in a great deal of unpleasantness and expense. The courts now have declared that all of the charges made against us were false and untrue.

“Reluctantly I have reached the point where I am no longer willing to continue to allow the lease to run for the benefit of people who act as certain of the partners have. I feel that there is no appreciation on their part for the opportunity which I have made possible, that they participate in profits out of this lease. [59]

“I have not the slightest doubt that had these people been able to get the lease away from me, they would have shut me out immediately.

(Testimony of John J. Kan.)

“Therefore, I wish to say that I intend to have the property of the partnership appraised and offered for sale at an early date. Anybody who wants to bid on it has that privilege. A notice will be mailed to each of you, informing of the amount of the appraisal and the date the property of the partnership will be put up for sale.

“Very truly yours,  
Ernest Tsang.”

The Court: It may be admitted and marked.

(The letter was marked Plaintiff's Exhibit 5, in evidence.)

Mr. Hatch: What is the date of that?

Mr. Scholz: February 1, 1946.

Q. (By Mr. Hatch): Mr. Kan, it is true, is it not, that previous to the date of that letter you went to the Wong Chung Company and tried to get the lease in your name? A. I did not.

Mr. Hatch: No further questions.

### SIDNEY A. ROMER

called as a witness on behalf of petitioner; sworn.

The Clerk: Will you state your name to the court?

A. Sidney A. Romer. [60]

Q. (By Mr. Scholz:) Mr. Romer, you were present in court this morning, were you not?

A. Yes, I was.

(Testimony of Sidney A. Romer.)

Q. Did you hear Mr. Kan testify that he had a conversation on January 24 in which you were present?      A. Yes.

Q. Were you present at that time?

A. Yes, I was.

Q. Will you state who were present?

The Court: January 24th of what year?

Mr. Scholz: What year and who was present?

A. It was January 24, 1944. Present were Mr. John Kan, Robert Hatch, Ernest Tsang, George Chew, and myself.

Q. Where did that conversation take place, or where did that meeting take place?

A. At Mr. Hatch's office.

Q. Will you state what was said and what was done at that meeting with respect to the controversy here?

A. Yes: I came into Mr. Hatch's office with Mr. Kan and stated that I was there because I had been informed that we were to discuss the terms of a release to be signed by Mr. Kan, a contract to be executed——

Mr. Hatch: Pardon me. I am going to object.

A. (Continuing): ——I am making a statement as to what I said when I came into the room.

The Court: His statement at that time and place. [61]

A. That I had come prepared to discuss the release that Mr. Kan was to execute, the contract that was to be given him for re-employment, and assignment of his interest in the business to Mrs. Kan. I was immediately informed that such was

(Testimony of Sidney A. Romer.)

not the case, at all, that Mr. Kan was simply expected to sign a release of all claims and assign his interest to his wife, without receiving any preference of any nature; if he did so that he would be re-employed at the Cathay House at \$500 per month. I said that I could not recommend his signing a release and getting nothing whatever in return, he would be giving away all his rights under the Selective Service Act, as well as any right that he might have of which he might not even be aware, and that if he were to sign a release he must have a contract; that if no contract were to be granted then no release should be signed. I asked why he could not be permitted simply to return to work at the Cathay House without any contract, without any agreement of any nature. I was informed that was not possible, that the release was a prerequisite. Mr. Kan was in full agreement with me; at the time I asked him in their presence if he was willing to return to work without any agreement and go back at a salary of \$500 per month, and he said he would; that not being possible it was my suggestion, or Mr. Hatch's, I believe it was mine, that perhaps these two people who had known each other so many years, had worked together, were being incumbered by too many attorneys, and perhaps if [62] they discussed the thing between themselves they might arrive at some basis on which Kan could go back to work, and that was the basis on which that meeting broke up.

Mr. Scholz: That is all.



(Testimony of Sidney A. Romer.)

Cross-Examination

By Mr. Hatch:

Q. Mr. Romer, is it your intention to convey to the court that you are quite certain that the matter of Selective Service, GI Bill of Rights, was specifically discussed at that meeting, or is that merely your impression?

A. No, I am quite certain that the Selective Service Act was discussed at that time. I can recall a statement by you—I can add a little to what I have said. I can recall a comment at the time by you that the release would be a release of everything and that actually Kan had no claims of any kind, had no right to be re-employed, that it was a kind gesture, or words to that effect, on the part of Mr. Tsang to take him back at all in any capacity, and I asked him, “Are you exempting the provisions of the Selective Service and Training Act as far as rights that he has,” and I don’t recall what your reply was to that, or whether you specifically replied or said that you did not think so.

Q. Then you would say there was no two-sided conversation on that subject there?

A. I don’t think you got into any discussion of the question of the Act at that time, but I do very definitely recall that [63] I brought it up in some manner.

Q. You are not undertaking to state at this time that either my client or I made any specific mention or reference to any rights that Mr. Kan might have under the Federal law?

(Testimony of Sidney A. Romer.)

A. I raised the point at the time, I believe I discussed it.

Q. You do not recall, or you do not state that anybody on my side of the picture made any statement or indicated to you that we were aware of that law?

A. No, I do not believe you dignified it in any way.

Q. Is this a fair description of that phase of the meeting as disclosed by your testimony before Judge Deasy?

A. A little more time has elapsed, but I think it was the same.

Q. That was back in 1945. Now, reading from page 74——

Mr. Scholz: Is this for the purpose of impeachment of the witness?

Mr. Hatch: It is not impeachment, it is a matter of refreshing the witness's recollection.

Mr. Karesh: Show him the transcript.

Mr. Hatch: I refer to page 74, beginning line 16. Will you read it?

A. Yes.

Mr. Hatch: May I read it, your Honor?

The Court: Yes.

Q. (By Mr. Hatch): Judge Ames was your associate in that case?      A. That is correct.

Mr. Hatch:

“Mr. Ames: I dislike to interrupt, but may I ask at that time whether the Selective Service and Training Act was mentioned at that meeting?

(Testimony of Sidney A. Romer.)

A. My recollection is it was specifically mentioned in reply to a comment of Mr. Hatch, that there were no rights that Mr. Kan had, and that I replied, or I said, 'Are you exempting the provisions of the Selective Service and Training Act?'

Q. And did he reply to that?

A. Nothing of a very definite nature that I can recall, or that he felt that it would not apply under any circumstances, something like that."

Q. That was the extent of your description of that phase of the meeting when you were testifying before Judge Deasy?

A. Yes, that is about the extent of it today.

Q. There was only one meeting on this subject that you ever attended, and that was the one of January 24, 1944?

A. That is right.

Q. And that is all of the testimony given before Judge Deasy on that subject?

A. Yes.

Q. So that there will be no peradventure of a doubt about this, you do not recall or attempt to testify that there was any discussion on the part of my client or myself in reference to the Selective Service Act or GI Bill of Rights, or any other [65] Federal law?

A. Nothing beyond what I have stated.

Q. That was none?

A. It goes beyond none from what you have read there, and what I recall I testified, in other words I raised the point.

(Testimony of Sidney A. Romer.)

Q. It is fair to say, is it not, that there was no discussion between the parties with relation to the Selective Service Act, whether it would be exempted from the provisions or otherwise?

A. No, I think it was simply a discussion between you and I.

Q. You know, do you not, that at that time you did not convey to me or my client any claim that Mr. Kan might have some rights under the Federal Law?

A. Simply what I testified to, Mr. Hatch, that I raised the point of the Selective Service Act.

Q. Just by that one question as to whether I was exempting the provisions of the Selective Service and Training Act and there was no response from me, that you recall?

A. I recall nothing definite.

Q. (By Mr. Karesh): It is true, is it not, that one of the conditions of re-employment was the signing over by Mr. Kan of his stock to his wife?

A. Yes, I testified to that.

Q. That was at the request of Mr. Tsang, was it not?      A. Yes.

Q. (By Mr. Hatch): Getting to the definition of what was related [66] to you by Mr. Kan, and what was related to you by me, wasn't that something which Mr. Kan told you before you came into the meeting?

A. Yes, because I came prepared to go into the details that we would get for the preparation of these documents, specifically expecting to work them out with you.

(Testimony of Sidney A. Romer.)

Q. But after you came to the meeting and announced that you would insist upon a contract for three years or more, then there was no discussion, was there, of any transfer of any interest by Mr. Kan to Mrs. Kan?

A. I do not recall what further discussion there may have been, because you immediately effectively terminated the conversation by stating that no contract of any nature was intended, and that he was simply to sign a release.

Q. Isn't this true, in substance, that the meeting amounted to this, that you came in there, stated your understanding of what you were there for, and that included a contract for Mr. Kan you stated that Mr. Kan wanted the contract for a period to be negotiated either for the duration of the war, or for a three-year period, or some other term satisfactory to the parties?

A. I believe that is correct.

Q. That is correct?           A. Yes.

Q. And as soon as you stated that there was nothing else discussed [67] in the meeting because I announced that we were unwilling to enter into any such contract?

A. You announced no contract whatsoever had been consummated, and that we would not enter into one, and there was no necessity of Mr. Tsang having to re-employ Mr. Kan, it was simply a gesture out of the kindness of his heart.

Q. Furthermore, after that suggestion it is now your recollection, is it not, that at the meeting there was no discussion about Mr. Kan transferring his interest to his wife?

(Testimony of Sidney A. Romer.)

A. I do not recall if there was any further discussion. You made the statement that you were where you started because the other things became moot.

Q. I rather gathered from Mr. Karesh's question of you that it was to be inferred that I had made the transfer to Mr. Kan's interest to his wife a condition precedent to his re-employment, and that condition precedent, that requirement was stated to you during this meeting.

A. I believe we did initially discuss it; that was one of the three things that were to be done that day.

Q. Now, getting back to this, it seems to be quite clear we never got around to discuss that because we were not agreeable to your primary proposition, that is to say, that Mr. Kan have a contract of three years.

A. I don't think we got into any considerable discussion on that point. [68]

#### Redirect Examination

By Mr. Karesh:

Q. Isn't it true that any re-employment of Mr. Kan was conditioned upon his signing a release?

Mr. Hatch: I object to that. The witness has already testified that there was nothing said at that time.

Mr. Karesh: I am asking about his understanding. You opened up that phase of the matter. I have a right to ask him his understanding about that particular phase.

The Court: What particular phase?



(Testimony of Sidney A. Romer.)

Mr. Karesh: Whether or not the condition of re-employment of Mr. Kan was that Mr. Kan would have to sign a release and transfer his stock to his wife, isn't that correct? A. Yes.

The Court: That may go out.

Mr. Hatch: From what his client told him before he came to the meeting is not binding on us. I have no objection to his testifying in full detail as to what occurred at the meeting.

Mr. Karesh: I can ask his understanding.

The Court: What his understanding was is a conclusion unless it is directed to some particular phase.

Q. (By Mr. Karesh): Wasn't it your understanding at that meeting that Mr. Kan would not be re-employed unless, 1, sign a release, and, 2, transfer his shares of stock over to his wife?

A. Yes.

Q. Wasn't that your understanding from what took place at that [69] meeting? A. Yes.

Mr. Hatch: I ask that the answer be stricken.

The Court: I will allow the question and answer to stand subject to your motion to strike and over your objection.

Q. (By Mr. Karesh): And your understanding was as a result of what was said in the meeting?

A. My testimony as to the specific conversation in Mr. Hatch's office on January 24, 1944, on the subject of the release, was not based on any particular understanding communicated to me from some other source, but was based on the discussion we had in his office at that particular time.

(Testimony of Sidney A. Romer.)

Mr. Hatch: Then I move to strike out the answer on the ground that he has already testified as to what was said and done.

The Court: I will allow the question and answer to stand.

Mr. Karesh: Now, your Honor, we objected to the testimony concerning the filing of the suit in the Superior Court, and your Honor overruled the objection. Under the circumstances I am going to ask whether he can explain the circumstance of the filing of the suit in the Superior Court.

A. Which action?

Q. In the first action, the action in which we have the transcript here.

Mr. Hatch: He did not file the suit. [70]

A. Mr. Hatch filed that suit.

Q. I mean when Mr. Kan filed a cross-complaint. Let me get these proceedings straight.

The Court: We will take a recess.

(After recess:)

Mr. Karesh: May it please your Honor, after reflection I would ask permission to strike the last question I asked as to the case in the Superior Court. He did not answer it.

The Court: What was that about?

Mr. Karesh: I asked about the action in the State court. As I understand it, Mr. Tsang filed a suit and Mr. Kan filed a cross-complaint. I am not going to examine Mr. Romer about that. That is all.

JOHN J. KAN

recalled.

By Mr. Karesh:

Q. Your testimony has been that you applied for re-employment at the Cathay House on or about December 4, 1943, is that correct?

A. That is correct.

Q. From December 4, 1943 to December 4, 1944, you were employed by Tiedemann & McMorran, is that right?      A. Yes.

Q. At 101 Mission Street, San Francisco, California?      A. Yes. [71]

Q. You had no other employment except the employment with Tiedemann & McMorran during that period?      A. That is right.

Q. Your withholding receipt for 1945 is \$2340. Refreshing your recollection from those figures, would you say that you earned approximately \$2340 from December 4, 1943 to December 4, 1944?

A. That is right.

Mr. Karesh: That is all.

## Cross-Examination

By Mr. Hatch:

Q. Was that all your income for that year outside of the dividends from the Cathay House?

A. Yes, that is all.

Mr. Hatch: That is all.

Mr. Karesh: I would like to call Mrs. Kan, your Honor.

HELEN KAN

called as a witness on behalf of petitioner; sworn

The Clerk: Will you state your name to the Court?

A. Helen Kan.

Q. (By Mr. Karesh): You are the wife of the petitioner? A. I am.

Q. During the period that your husband was in the armed forces you were employed at the Cathay House? A. I was.

Q. And you had occasion in your employment to observe the work [72] done by Mr. Kan, is that correct? A. That is correct.

Q. Will you tell this Court, of your own knowledge, whether during the period your husband was in the service Mr. Tsang did any additional work than that which he had performed when your husband was working?

A. Not that I know of, because he employed another man to take my husband's place by the name of Henry Lee.

Mr. Karesh: That is all.

Cross-Examination

By Mr. Hatch:

Q. Do you know what the other man was paid?

A. No, I do not. I did not have access to the books.

(Testimony of Helen Kan.)

Q. Are you aware that this other man, whoever it was, did not do nearly as much work as your husband did when he was there?

A. Well, my husband had done advertising and it was all laid out, anyone could follow such a system.

Q. This other man, what was his name?

A. I know his first name was Henry, and I believe his last name was Lee.

Q. Did Henry receive the customers that came on the floor? A. That is right?

Q. Did he do anything else?

A. Not that I know of.

Q. Your husband testified that he did marketing, and all of these other things you heard him testify to today? [73] A. Yes.

Q. Mr. Henry Lee, however, did not do any of those things your husband did, except to receive the customers as a sort of head waiter, isn't that correct? A. As far as I know.

Mr. Hatch: No further questions.

Mr. Karesh: He didn't do any marketing, did he? A. No, that was up to the kitchen staff.

Mr. Karesh: That is all.

Mr. Hatch: I should like to recall Mr. Romer for further cross-examination.

The Court: Proceed.

SIDNEY A. ROMER

recalled.

Cross-Examination  
(Resumed)

By Mr. Hatch:

Q. Mr. Romer, you were one of the attorneys in the case of Kan vs. Tsang, in the State Court, in San Francisco, No. 349,840, as testified to by Mr. Kan? A. Which action was that?

Q. That was the dissolution proceeding.

A. Yes.

Q. It is true that you initiated that action by filing it with the County Clerk on February 13, 1946?

A. You have the papers there. I am satisfied with your statement [74] of it.

Q. It is true that a decree of dissolution was entered in that case prior to today?

A. Yes.

Q. That decree was entered by stipulation of all the parties, including your client?

A. I do not recall the manner in which it was entered at this time, Mr. Hatch.

Q. I would like to refresh your recollection from the document here.

A. I would be glad to have it done.

Mr. Karesh: Of course, I will object to all of this testimony.

The Court: Proceed.

Mr. Hatch: I might call to your attention it is on your stationery. A. That is what it shows.



(Testimony of Sidney A. Romer.)

Q. It is true that the Court appointed a receiver in that case and that the receiver is still in office? A. Yes.

Q. It is true that prior to this date that the court in that case made an order prescribing the time within which claims could be filed? A. Yes.

Q. It is true that Mr. Kan filed one or more claims with the receiver [75] in that action?

A. Yes.

Q. It is true that he filed no claim with the receiver predicated upon or related to the action pending before this court?

A. I believe there was a flat claim of \$20,000 filed, Mr. Hatch.

Q. That claim was by me, if I may remind you, on behalf of Mr. Tsang.

A. I recall an additional claim being filed by Mr. Kan. Judge Ames prepared that claim, but I recall having seen it.

Q. Put it this way: You know that subsequent to the expiration of that period the receiver filed his report with the court and while I filed certain objections to the report that none were filed by your office, or by Mr. Kan?

A. That is correct.

Q. And in that respect any claim which Mr. Kan might have filed has been abandoned by now?

A. No claim filed with the receiver?

Q. Yes. A. I suppose that is true.

Q. No such claim is being pursued by Kan against the receiver at this time?

A. That is true.

(Testimony of Sidney A. Romer.)

Q. And that the Court is proposing in the State proceeding to conclude the receivership and the dissolution of this partnership without regard to the pendency of this action? [76]

A. I don't know what the Court proposes to do.

Q. You have not been present in the later proceedings?           A. No.

Redirect Examination

By Mr. Karesh:

Q. Since there has been something said about the petition for dissolution, can you explain to the Court why it was Mr. Kan and these other two partners filed a petition for dissolution of the partnership?

A. The specific grounds, as I recall them, were dissipation of the assets. Mr. Tsang had threatened to dispose of or have the lease terminated, the lease under which the partnership occupied the premises, the Cathay House, and the Court ruled that whatever rights there were in the lease were held for the benefit of the partnership, that no one person could take them for his own benefit. The letter that you have there that you have read in evidence——

Q. Plaintiff's Exhibit 5?

A. (Continuing): ——was actually the basis for the action for dissolution, to prevent further dissipation of the assets.

Mr. Hatch: I do not think anything could be gained by developing the contentions of the parties underlying the dissolution. It is before the court that the partnership was going to expire two months

(Testimony of Sidney A. Romer.)

later, and without wanting to embarrass Mr. Romer, who is a good friend of mine, I am quite confident if they had looked at the articles of the partnership they would have never asked for dissolution, but the sum and substance of it was and is that the individuals did not get along together.

Mr. Karesh: We do not want to go into that.

Mr. Hatch: You brought it up.

The Witness: Could I perhaps make a voluntary statement, that we were thoroughly aware of the date that the partnership would terminate, but the purpose of the petition was to conserve the assets and preserve the lease and everything possible to see that the assets were on hand three months later that were on hand at the time the threat was made to dispose of them. That was the purpose of the action.

Q. (By Mr. Hatch): Isn't it fair to say that after facts were developed and the receiver reported they found that everything was in the best of condition so far as the accounts and money and everything from a commercial accounting view?

A. That is right.

Q. Were you present at the time of the sale in court over there?      A. No, I was not.

Q. You know from the records in the case that what was sold was the physical assets of the business, together with the license?      A. Yes.

Mr. Karesh: And the good will?

A. That is correct, and the name. [78]

Q. And all of the work that Mr. Kan put in to build it up?      A. Yes.

(Testimony of Sidney A. Romer.)

Mr. Hatch: That should be qualified. Under the law the partnership has no good will when it expires in a period of three months.

The Court: What about this witness?

Mr. Hatch: That is all. Does the Government rest?

Mr. Scholz: The Government rests.

Mr. Hatch: At this time I move the Court for an order of nonsuit, a judgment of nonsuit and dismissal, particularly emphasizing that the only defendant in this case is Ernest Tsang as an individual.

The record affirmatively shows from the testimony of Mr. Kan, himself, that he was never employed by Ernest Tsang. He was employed first by the corporation, and only by the corporation. It is possibly arguable that if the corporation was legally obligated to have restored Mr. Kan to his position, that the partnership took over that responsibility as a continuation of the corporation; it would be on the theory that there was no division of entity.

Be that as it may, this action obviously is not asserted against the partnership, nor against the receivership, which would be the same thing. The suit is against several individuals, not all of the partners, alleging that they are partners in the Cathay House; they do not sue the Cathay House, they [79] sue certain individuals.

It now develops that Mr. Tsang, the only defendant on trial, never was an employer, therefore never could have been obligated to return this man to his

position. In that regard, Mr. Tsang is clearly beyond the pale of any theory of continuation of employer's identity. His connection as an individual began only after the sale of the assets in the receivership. He did not take over any liabilities of the business. He bought only the physical assets, together with what goodwill inured. The liabilities were something which were filed against the receivership. The receiver has charge of whatever liabilities were presented to him. This liability is not one to be asserted against a purchaser at a public sale. It should have been asserted, and may still be asserted against the partnership, inasmuch as the receivership has not been wound up.

I respectfully submit that the only person who possibly is responsible would be the partnership by and through the receiver; if they want to assert that remedy they have either a remedy in this Court by bringing him in as a party defendant, or by presenting a claim against him in the State Court, whichever they wish. That is the mode of procedure as I see it.

I make that motion and urge that the Court rule accordingly.

We have reached a point where it appears affirmatively that Mr. Tsang, as an individual, never had any liability which must be based against the employer, or one responsible as the employer. [80]

Mr. Karesh: That, your Honor, I feel is so extraordinary that I do not think it calls for an answer.

(After argument.)

The Court: Is the matter submitted?

Mr. Hatch: Yes.

The Court: The motion will have to be denied.

(An adjournment was thereupon taken until tomorrow, Thursday, September 11, 1947, at 10 o'clock a.m.) [80-a]

Thursday, September 11, 1947, 10:00 o'Clock A.M.

Mr. Karesh: May it please your Honor, Mr. Kan stated that he has earned approximately \$2300, he had a withholding certificate and that withholding certificate was for 1945 rather than 1944. He has checked with his employer since yesterday, your Honor, and he has the withholding certificate for 1944, and I would like to put him on the stand to correct that mistake.

JOHN J. KAN

recalled;

Q. (By Mr. Karesh): Mr. Kan, I think yesterday you testified that from December 4, 1943 to December 4, 1944 that you had earned approximately \$2300 with Tiedemann & McMorran. That is a mistake, is it not? A. Yes.

Q. You made a check and definitely ascertained how much you earned since last night?

A. Yes, I did.

Q. You checked with your employer?

A. I did.

Q. And for that twelve-month period it is approximately \$1518, is that right? A. Yes.



(Testimony of John J. Kan.)

Q. I am showing you your withholding receipt for 1944, and [81] that has approximately that amount of money?

A. That is right. Might I explain that this is from February 8, 1944.

Q. From February 8, 1944 to January 4, 1945 you earned \$1518.52; in other words, you did not go to work for Tiedemann & McMorran until February 8, 1944? A. That is right.

Q. Did you earn anything else during that period of time? A. No.

Mr. Hatch: What period of time?

Mr. Karesh: From December 4—the pertinent period would be from December 4, 1943 until December 4, 1944.

Mr. Hatch: I would assume in the absence of any authority to the contrary, the pertinent period would be one year from the time he indicated to the employer his willingness to return to work.

Mr. Karesh: However, it is our contention that he never told him he could go back to work.

Mr. Hatch: Put it this way, under the statute he would have to go back within 90 days or ask for a job. If he indicated that he was ready, able and willing to return to the same job that would have been the time when the employer would have been obligated, if at all, to restore him. If the employer refused that would start the one-year period. I do not know what date they claim that the plaintiff indicated his willingness [82] to return.

(Testimony of John J. Kan.)

Mr. Karesh: In any event, from December 4, 1944, until January 4, 1945 the petitioner earned \$1518.52, so that is approximately the period we are concerned with.

The Court: The evidence will disclose the matters that you have in mind?

Mr. Hatch: They do not yet. There is no evidence as to when the petitioner indicated his willingness to return to work.

Mr. Karesh: That was on December 4, 1943: that is right, is it not, Mr. Kan? A. Yes.

The Court: Let it be admitted and marked.

Mr. Karesh: I will leave this withholding receipt here and ask that it be received in evidence. You have no objection, have you?

Mr. Hatch: No.

(The withholding receipt was marked Plaintiff's Exhibit 6 in evidence.)

#### Cross-Examination

By Mr. Hatch:

Q. When did you first undertake to obtain employment other than at the Cathay House following your return from service?

A. In February, 1944.

Q. When did you go to work?

A. On February 8, 1944. [83]

Q. That was with Tiedemann & McMorran?

A. That is correct.

Q. You remained with Tiedemann & McMorran how long? A. Until January, 1945.

Mr. Hatch: That is all.

(Testimony of John J. Kan.)

Redirect Examination

By Mr. Karesh:

Q. As a matter of fact, in January of 1945 what was your monthly earning?

A. I only worked two weeks in January, 1945.

The Court: At this time I have another matter to take up. You may be seated.

(Recess.)

The Court: Now, Mr. Hatch, you may proceed.

Mr. Hatch: I wish to be sworn, your Honor.

ROBERT E. HATCH

called for the defendant; sworn.

The Clerk: Will you state your name to the court?

A. Robert E. Hatch. I have offices in the Mills Tower. I am an attorney at law, and have been for some years past admitted to practice in this court.

Mr. Karesh: Are you going to testify?

Mr. Hatch: Yes.

Mr. Karesh: I just want to tell you that if you testify you may waive your right to argue.

The Court: There will be no necessity of waiving any right. I have a procedure of my own here.

Mr. Hatch: I appreciate counsel's admonition; the rule however is that it is discretionary with the court, and it is not customary to deprive counsel of argument in a non-jury case. If the court wishes me not to argue it will say so. May I proceed now?

Mr. Karesh: Are you reading from a transcript?

(Testimony of Robert E. Hatch.)

Mr. Hatch: I am going to refer to two documents in my testimony; one is the deposition of John Kan and the other is the transcript in the case before Judge Deasy. Do you have copies of them?

Mr. Karesh: I have not the deposition of Mr. Kan and I have the transcript.

Mr. Hatch: I may have an extra copy of the deposition which I will let you have. [85]

Mr. Karesh: I am going to make an objection to your looking at the transcript and the copy of the deposition while you are testifying.

Mr. Hatch: If your Honor please, it is the proper procedure for the purpose of refreshing my recollection.

Mr. Karesh: You cannot refresh your recollection from anything Mr. Kan said; you had your opportunity of cross-examination of Mr. Kan on the stand.

Mr. Hatch: May I proceed?

Mr. Karesh: I register my objection now.

The Court: There is nothing before the court now.

Mr. Karesh: Except, your Honor, that counsel is looking at some transcripts.

The Court: I don't know what he is going to do.

Mr. Karesh: He said he is going to look at the transcripts.

The Court: He has a right to look at them. So that you have a record, what is the purpose of the offer?

(Testimony of Robert E. Hatch.)

have no occasion to bring up any of their past differences that they sign some little memorandum mutually releasing each of them against any possible claim and that they agree to let bygones be bygones; everybody was to start fresh and there was to be no more repetition of the opening of the old sores. In that respect I asked Mr. Kan whether he had any claim against the company; whether he was satisfied with the manner in which the business was being run; whether he was satisfied with the transition of the operations from the corporation to the partnership, pointing out the [88] saving to him in the matter of taxes. He said that was all right, it was satisfactory, that he had no claim of any kind. There was no mention of selective service in the slightest or anything akin to the GI Bill of Rights. The basis of discussion, as stated by Mr. Kan, was merely that he was back from service, he knew that business had improved, and that he wanted to come back and go to work, and he would see that he would be a faithful, reliable and valuable employe. There was the usual felicitation among the partners and parties present, that they were happy everything was solved and satisfactory and saw no reason why the future of the business and of the participants would not be a very happy one.

Q. (By Mr. Karesh): Will you state the parties present at that meeting?

A. Mr. Tsang, Mr. George Chew—if I recall he was the secretary of the corporation and one of the principal partners in the business—Mr. John Kan and myself.

(Testimony of Robert E. Hatch.)

At the close of the meeting, as they were about to depart, Mr. Kan said "this is all satisfactory to me; however, inasmuch as you"—addressing me—"are the attorney for the partners in the partnership, I think the best and proper thing would be for me to discuss the matter with my attorney, Mr. Romer, and see whether that is satisfactory to him before I make my final commitment, and unless Mr. Romer says there is anything wrong with this, it is all right with me, I will [89] go back to work at \$500 a month."

The Court: Is that the Mr. Romer who was a witness here yesterday?

Mr. Karesh: Yes.

The Court: Where is he today?

Mr. Karesh: He is not associated in the trial of this case.

The Court: There is testimony coming in here as to Mr. Romer.

Mr. Karesh: Counsel has not yet come to where Mr. Romer was present.

The Court: Mr. Romer was not present?

A. Mr. Romer was not present at the first meeting. I might state to your Honor that Mr. Romer's testimony, as he has given it, coincides literally; with one minor exception I will make, I agree wholeheartedly on what occurred. The meeting ended with an arrangement with Mr. Kan that he would let us know if Mr. Romer approved this arrangement. Following that meeting, within a day or so, I had a call from somebody, I forget from whom,



(Testimony of Robert E. Hatch.)

asking that we have a further meeting and have Mr. Romer attend. I had not known Mr. Romer before. On January 26 or 27, I believe the date was, I do not recall exactly—two or three after the first meeting, pursuant to appointment, the same parties were present with the addition of Mr. Romer. Mr. Romer and Mr. Kan came in to the meeting. After the usual pleasantries, Mr. Romer, being invited to state what his view points were, said that [90] he had discussed the subject matter with Mr. Kan, and that he felt the proper basis for Mr. Kan to return to work would be upon a written contract, not on a temporary basis which he was employed on before the war period.

Q. (By Mr. Karesh): Is that your conclusion or something that Mr. Romer said?

A. That is the exact phraseology or substance of what Mr. Romer said, and not my conclusion. I think I can cover that in a moment, Mr. Karesh. I told Mr. Romer promptly that there had been no discussion of any written contract; there had been no contemplation of such; and I would advise my people against entering into a written contract with Kan or anyone else for his employment at this place over an extended period of time, not knowing whether the employe was going to be a satisfactory employe. Mr. Romer said regardless of that Mr. Kan will not return to work, at least, that will be my advice to him, unless he does have a written contract. I asked him "what is the basis of your contract? Why should there be a contract when there was none before?" And he said in substance that

(Testimony of Robert E. Hatch.)

Mr. Kan was a minority interest holder and as such could not stay in if the majority wanted him to be discharged, and that under such circumstances he should have a contract. He said the period of it, he thought, should possibly be for the duration of the war, or in the alternative a three year period. I said to him that my advice to my people would be against entering into a contract of that sort. We then asked Mr. Kan if he was willing to return without a contract, and he said he was not. I said to Mr. Romer, if that is the situation we have little to discuss. I am sorry because at the last meeting it appeared that everything had been satisfactorily arranged, and that Mr. Kan was prepared to return on the same basis as before the war. I said that his position was still available to him on that basis but that we would not be agreeable to make an additional concession to him in view of the circumstances and particularly the history. The meeting was very short, rather abrupt, and very little discussion other than that because of the interjection of this new proposal and our unwillingness to meet that as a condition precedent to the return of the employee.

I wish to state to the court that there was to my firm knowledge no discussion or mention of the Selective Service Act or the GI Bill of Rights; I have that firmly in mind, and therefore testify to it as a positive fact, because that subject came to me as quite a surprise afterward when the litigation ensued. I was not aware at that time that there was this provision under the 1919 Act of Congress—

Mr. Karesh: 1940.

(Testimony of Robert E. Hatch.)

Mr. Hatch: I understood, I may be wrong, that this goes back to the First World War, and had I known there was such a provision it would have registered in my mind. I must [92] admit my complete unfamiliarity with any such federal provision at that time. As a consequence it was not discussed; otherwise it would have come to my attention and I would have made inquiry. There had been no mention of it in the first meeting and there was no mention of it in the second meeting.

When it came to the question of the mutual release that was to be executed formally or informally, to my recollection there was little and perhaps no discussion at the second meeting because we never reached that point. We were at loggerheads because of the interposition by Mr. Kan and his attorney of this requirement of a written contract of employment.

Furthermore, I testify that Mr. Kan was in error when he testified yesterday that there was a discussion of a contract at the first meeting. There was no discussion of a contract. To the contrary it was very definitely stated to Mr. Kan at the first meeting that if he came back to work it would be on the same basis as before the war, that is that he would be an employe the same as any other employe of the business. The gist of the conversation at the first meeting was with an emphasis upon the proposition that it would be an employment such as he had before over an indefinite period. I can't think of another point I wanted to recall; it has escaped my mind.

(Testimony of Robert E. Hatch.)

At the first meeting when I asked Mr. Kan as to whether he had any claim against the partnership, as I have just testified, he said he had none. He did not mention that he had any right [93] under any Federal or State law. As I stated the position that he asserted was merely that he had a job before he went in the service which was something he was equipped to do, and had what we might call a fraternal interest in the enterprise because he had been one of the promoters of it and had spent a substantial part of his life in building up the business and he wanted to go back in there because that is where his interests remained. There was no discussion whatever of a right to return but merely that he wanted to return and hoped that the partnership wanted him back. There was no discussion about his going back for any definite period of time either because he wanted to or because he had a right to.

In the discussion of this informal or formal mutual release there was no question raised by him or anybody else that that might be construed as a waiver of any right he might have under the Federal law because that subject was not mentioned or discussed. Had it been discussed there would have been a different line pursued in relation to the form of the document. The document incidentally was never drafted for the reason that when they came back at the second meeting they were unwilling to go back on any basis except their own terms which were unsatisfactory to the employer. And so far as I recall at the second meeting neither Mr. Romer

(Testimony of Robert E. Hatch.)

nor Mr. Chew got to the point of how much they wanted per month [94] because we were stymied immediately by the insistence of an extended period of employment.

That, if your Honor please, covers the substance of the two and only meetings that we had.

Now, insofar as I know or it has come to my attention, and I have been present in every proceeding in the ensuing litigation—Kan has never before yesterday testified that——

Mr. Karesh: Just a moment. Are you referring to these two meetings, or are you going to relate something which he might or might not have testified to?

Mr. Hatch: I am referring to all the times that I heard Mr. Kan testify.

Mr. Karesh: That is improper. Counsel cannot impeach Mr. Kan by certain statements that he says he heard or did not hear other times. He is limited to these particular times that he had the conversation with Mr. Kan.

The Court: There were two meetings held?

Mr. Hatch: That is right and I have testified to that. Now I wish to establish by my testimony that some of the features which Mr. Kan testified to yesterday have never been claimed nor asserted by him at any time before yesterday.

Mr. Karesh: I object to that, your Honor. That is obviously a conclusion to be reached by the court. Counsel has no right to clutter up the record with these self-serving declarations. [95]



(Testimony of Robert E. Hatch.)

The Court: If there is anything contradictory he may read it.

Mr. Hatch: Conflict in testimony, if I may suggest, is one thing. Absence of testimony is not a conflict with what a man testifies presently, but the fact is that when interrogated previously upon the same subject the witness did not testify as he presently does.

Mr. Karesh: I move that that be stricken.

The Court: It might be pertinent as indicating that he was not asked.

Mr. Hatch: Let me put it this way.

Mr. Karesh: Now, your Honor, counsel is an experienced counsel and he cannot get into the record now what he is trying to get. First of all he cannot get anything in the record at this time in an attempt to cast a slur on Mr. Kan. He had Mr. Kan on the stand during the deposition and you had the transcript and you had time to familiarize yourself with it, and you know the rules and you could have asked Mr. Kan if he said this on page 2 or page 10. I will ask, your Honor, that he be instructed to go on along those lines.

Mr. Hatch: May it please the court, I do not subscribe to that as being the law. My contention is that when a man testifies in court, and as he did yesterday identify these two records, the deposition and the transcript as being what he answered to the questions that are therein asked, I do not [96] have to ask him whether he gave those answers; he has stated them to be true. I now propose to show to the court that upon those occasions Mr. Kan——



(Testimony of Robert E. Hatch.)

Mr. Karesh: I am going to press my objection; you are getting into the record by indirection what you know that you have no right to.

The Court: He is stating his legal position; he has a right to do that. He is now stating what he proposes to show.

Mr. Hatch: I propose to show to the court at this time that on those occasions Mr. Kan has been interrogated at length and asked to testify as to what occurred at those two meetings, and I propose to show by my testimony as a person who was present at the time he testified, and by refreshing my recollection from these documents that he did not testify as he did yesterday.

The Court: That may be a good argument but you will have to lay a foundation as to the admissibility of that testimony.

Mr. Hatch: I was about to testify on that when I was interrupted.

Mr. Karesh: As I understand your Honor's ruling, laying a foundation would mean he would have to lay a foundation by asking Mr. Kan on the stand and asking him if he so testified. [97]

The Court: I am not concerned with indicating to counsel how to proceed. I am ruling here in relation to the matters presented. My thought is simply this, if you propose to contradict or challenge the testimony of the witness on the stand then I indicate that you should lay a foundation to do so, or show that you cross-examined on the matter that you now have in mind that you are going to repudiate so that we would have a proper record.

(Testimony of Robert E. Hatch.)

Mr. Hatch: I did not understand the basis of your Honor's ruling yesterday after the witness had testified these documents were correct transcripts and your Honor refused the documents in evidence, and I thought that was contrary to law. When Mr. Kan was on the stand I asked him to read these two documents, the deposition and the state court transcript; he read them and I asked him the question, "did you give those answer to those questions that are in there and he said "yes." I then offered the documents in evidence. I believe that there is adequate legal authority to support the foundation on that basis.

The Court: I don't know what ruling I made.

Mr. Hatch: I then offered——

Mr. Karesh: Let me explain——

Mr. Hatch: I am addressing the court and I prefer not to be constantly interrupted. These documents were immediately by me offered in evidence and your Honor rejected them. Whether that was a correct ruling or not is not of immediate consequence because I was present at the time that that testimony was given, [98] and as a witness I am entitled to testify as to what Mr. Kan said regardless of the transcript.

The Court: There is no question about that.

Mr. Hatch: There is no question about that. There is no compulsion on me to cross-examine the witness as to what he said because I have the choice of either attempting to break him down and take a chance that he will build himself up by volunteer

answers or proceed as my own witness, and that is what I intend to do. (After argument.) We are prepared to proceed now with my testimony independent of the transcript.

The Court: It is time for a recess, and I have some other matters to take up now.

(After recess.)

Mr. Hatch: Might I put Mr. Tsang on, he has some business to attend to.

The Court: Call him to the stand.

### ERNEST TSANG

called for Defendant; sworn.

The Clerk: Will you state your name to the court?

A. Ernest Tsang.

Q. (By Mr. Hatch): Mr. Tsang, you are the defendant in this case? A. Yes.

Q. You first became connected with the Cathay House incorporated shortly after its incorporation?

A. That is correct. [99]

Q. At that time what occupation did you have?

A. I was in the employ of the United States Immigration Service.

Q. And had been for a period of years up to that time? A. Yes.

Q. How many years?

A. I would say around twelve or thirteen years.

Q. You got in the Cathay House by investing some money as a stockholder?

A. That is right.

(Testimony of Ernest Tsang.)

Q. Some time after that, shortly afterward, you gave up your government employment and spent your full time at the Cathay House? A. Yes.

Q. Ever since that time you have continuously spent all of your time working at the Cathay House?

A. That is correct.

Q. Without going into too much detail, during the first year with the Cathay House did you have successful financial operations?

A. Very unsuccessful.

Q. You were compelled to put in more money to save your investment, were you?

A. Yes, I was.

Q. You bought additional stock?

A. I did. [100]

Q. Mr. Kan on the other hand never put in any more than his original investment of \$1100?

A. That is right.

Q. When it was necessary to put up more money to save the business, did Mr. Kan refuse or state that he was unable to put up more money?

A. He stated both that he was unable and also refused.

Q. By the time that Mr. Kan went into the service did the preponderance of the outstanding stock of the corporation belong to you?

A. That is correct.

Q. Generally from the time you become connected with the Cathay House as a minority stockholder until you became a majority stockholder, what was the general relationship between you and Mr. Kan?

(Testimony of Ernest Tsang.)

A. Immediately after my becoming active in the business my presence seemed to be resented on the premises and at all times there was nothing but friction and bickering back and forth between us.

Q. Let me put it this way: at the time that you first bought stock, Mr. Tsang, Mr. Kan was the secretary of the corporation?

A. I believe he was.

Q. He remained on as such for a period of time?

A. That is correct.

Q. And also a director?

A. That is so. [101]

Q. And at one of the directors' meeting—I might state to the court that I thought I had the minutes in my office, but I find they are still over in the District Court of Appeals, I have not withdrawn them—at a meeting of the directors of the corporation did Mr. Kan attempt to vote you out of office? A. He did.

The Court: Lay the foundation, time and place.

Q. (By Mr. Hatch): Was it before he went into the service?

A. Yes, approximately September, 1940.

Mr. Karesh: You have not got the minutes?

Mr. Hatch: No, they are over at the District Court of Appeals. I could get them at noon time.

The Court: He said it was September, 1940.

Mr. Karesh: I do not see the relevancy of what happened in 1940, September, when he tried to vote somebody else out.

The Court: What is the purpose?

(Testimony of Ernest Tsang.)

Mr. Hatch: I wish to show that, among other things, that while I stipulated yesterday he had the ability to perform the duties of his job, that despite that, by his general conduct he had demonstrated himself to be an unsuitable employee and that it would be against all principles of law and equity for him to be restored to that job. That is one of the defenses under the Bill of Rights.

Mr. Karesh: May it please your Honor, I move that all of [102] the testimony in relation to this be kept out of the record. Mr. Kan was discharged long after 1940. Your stipulation was that he had the ability and you have foreclosed yourself from going into anything that might reflect upon the integrity of Mr. Kan.

The Court: The objection will be overruled.

Q. (By Mr. Hatch): At that meeting is it a fact that either Mr. Kan or one of his friends in the company nominated a list of officers and as soon as the nominations were made and before you had a chance to make a nomination, moved to have the nominations closed?

Mr. Karesh: Objected to as immaterial, irrelevant and incompetent; furthermore the question is complex; he spoke about Mr. Kan or one of his friends.

The Court: Who was the friend? Identify him.

Q. (By Mr. Hatch): Do you recall his name?

A. Fred Leong.

Q. Who was it that moved the nomination of certain officers?

A. Mr. Kan.



(Testimony of Ernest Tsang.)

Q. What persons did he nominate?

A. He nominated various men he had on his side of the fence as he called it. Among them at that time were—Among them at that time were Philip Fong, George Chin, Fred Leong and himself.

Q. What did he next move? [103]

A. On his part he moved that the nominations be closed.

Q. You thereupon insisted upon making your own nominations? A. I did.

Q. And as a result of voting your own stock and others you voted in yourself and others?

A. I did.

Mr. Karesh: I move that all of the testimony be stricken as being too remote, what happened in 1940?

The Court: The objection is overruled.

Q. (By Mr. Hatch): Mr. Kan was continued on as the secretary of the corporation until the following year? A. I think that is right.

Q. And then he was removed? A. Yes.

Q. That would be some time in the year 1941?

A. That is correct.

Q. From that time on Mr. Kan was not a corporate officer of the Cathay House, either President, Secretary, Treasurer?

A. He was not?

Q. But he remained on in the employ of the corporation?

A. Yes, and also as one of the directors.

Q. One of its directors? A. Yes.

(Testimony of Ernest Tsang.)

Q. He went into the service on July 23, 1943; in the year or so preceding that time did he have any written contract of employment? [104]

A. No, nor any other time.

Q. Did he ever have any oral contract of employment with the Cathay House, a corporation?

A. He did not.

Q. At the time that he went into the service he was drawing \$500 a month?

A. That is correct.

Q. Now while he was in the service was he continuously in the United States?

A. I believe he was.

Q. And his wife worked at the Cathay House?

A. Yes.

Q. In what capacity?

A. That of bookkeeper.

Q. Did you increase her salary in the light of the fact that her husband was in the service?

A. I did.

Q. You kept her on in that concern until she voluntarily resigned?

A. That is correct.

Q. That was after Mr. Kan's return, I believe?

A. That is right.

Q. In the fall of 1943 did you, upon legal advice, undertake the transfer of this corporate activity into a partnership activity in order to minimize taxes?

A. I did. [105]

Q. Was there any other reason for the change?

A. No.

Q. Were the partnership interests identical with the stock interests?

A. They were.

(Testimony of Ernest Tsang.)

Q. Did you take that matter up with Mrs. Kan before the partnership was effected? A. I did.

Q. Did she have a power of attorney from Mr. Kan to sign his name? A. She did.

Q. Do you know whether she communicated by letter with Mr. Kan on the subject?

A. I don't know.

Q. Did you personally take the proposed articles of partnership over to Sidney Romer as attorney for Mr. and Mrs. Kan and discuss the matter?

A. Not only that but I requested Mrs. Kan to put her initials on the document so that Mr. Romer would know that he was shown the same thing that she had put the initials on.

Q. When you talked to Mr. Romer he approved the set-up? A. That is correct.

Q. And thereupon Mrs. Kan signed her husband's name and her own?

A. That is correct.

Q. And the transfer was made from the corporation to the partnership effective October 1, 1943?

A. That is right. [106]

Q. Up to the time that the corporation was transferred did the corporation at all times have the full number of directors and the usual corporate officers such as president, secretary and treasurer? A. Yes.

Q. During most of the period from its inception to October 1, 1943, those officers and directors were Kan and his associates?

Mr. Karesh: Just what do you mean?

(Testimony of Ernest Tsang.)

Q. (By Mr. Hatch): In the rift between you and Mr. Kan, certain of the stockholders stood with him and certain with you; is that correct?

A. That is correct, but in order to preserve peace and harmony to the best of my ability up to or around the time that Mr. Kan went into the Army I allowed him to have the majority of the directors on the board.

Q. Who were the stockholders in say 1940 who were favorable to and voted with Mr. Kan?

A. They were Philip Fong, George Chin and Fred Leong. Those were all.

Q. (By the Court): How many directors altogether?

A. Seven altogether. I allowed four to be on his side and three on mine.

Q. (By Mr. Hatch): During all of that time did the corporation have an accountant?

A. It did. [107]

Q. A bookkeeper kept a full set of books?

A. Yes.

Q. And deposited all of the receipts in a bank account?

A. Yes, that is correct.

Q. Say in the ear 1940 or 1941 what was the gross volume of business—in the neighborhood of \$100,000?

A. It was \$250,000 gross.

Q. And all of the receipts and disbursements were in the usual course of business duly recorded and reported?

A. That is correct.

(Testimony of Ernest Tsang.)

Q. So far as you know, as president of the corporation did it act in a full corporate capacity and function during the time of your presidency?

A. It did.

Mr. Karesh: You are leading the witness; you are testifying.

The Court: Proceed.

Q. (By Mr. Hatch): Were the receipts and disbursements reported to the stockholders?

A. Yes.

Q. And dividends were paid to the stockholders?

A. Yes.

Q. From time to time? A. Yes.

Q. Turning to the month of December when Mr. Kan returned from service, having been away since July, did he come to see [108] you about getting his job back? A. He did.

Q. Without going into detail what was the gist of your conversation or conversations with him prior to the time of the meeting in my office on January 24th, 1944?

A. As I recall it was on the afternoon I was working——

Q. Don't go into details. What was the gist of the several conversations?

A. I am referring to the first occasion Mr. Kan came into the place in uniform and said "how about a job" and I said "O K, come back to work," and he replied that he would accept the position, to which I agreed. After that time he came to see me and I asked him if he was coming back to work,

(Testimony of Ernest Tsang.)

and he said yes, but there were some matters to discuss, and asked me to have lunch with him over on Fishermen's wharf, which I did, to discuss what he had to say. At that time no one else was present but the two of us, and he said that he would only come back to work on condition that his salary was increased from \$500 to \$750 per month. I told him I did not have the power to increase his salary and the decision would have to come from the majority of the other stockholders, and that the reason I was getting \$750 a month was because I was doing more work than I had done before and it was voted to me by the stockholders. That was the first of the meetings.

Q. Did you have numerous meetings with him before this first [109] meeting in my office?

A. Yes, numerous.

Q. State what this gun episode was?

Mr. Karesh: There is no testimony that there was a gun episode.

The Court: You will have to fix the time and place.

Mr. Hatch: I think the witness can do that.

Mr. Karesh: Furthermore, in fairness to Mr. Kan, who served honorably in the service, I am going to strenuously object to the "gun episode." Counsel has stipulated that Mr. Kan was capable of going back to work and was qualified to perform it, and I do not think that this should be any part of the record.



(Testimony of Ernest Tsang.)

The Court: Counsel will indicate the purpose.

Mr. Hatch: There are two purposes, your Honor. One, to show that he was not a suitable employee although he could have been if he wanted to be. He manifested the fact that he was not a suitable employee. Secondly it goes to the credibility of Mr. Kan who says that he was entitled to be restored to his job. We will show that he tried to force himself upon these people and that he threatened the life of the president of the corporation, which to my mind, if I was trying the facts in the case, might influence me considerably in determining whether his testimony was reliable.

Mr. Karesh: You should have asked Mr. Kan about the gun [110] episode.

Mr. Hatch: I did not have to ask Mr. Kan.

Mr. Karesh: I object to counsel going into this collateral matter.

The Court: The court is prepared to rule. For the limited purpose indicated by counsel I will allow the testimony.

Q. (By Mr. Hatch): In December of 1943 did Mr. Kan bring a gun into the Cathay House? Answer yes or no? A. Yes.

Q. What statement did he make in reference to the gun?

A. Do you want me to use the words that he used?

A. Yes, I do. Don't be so embarrassed.

A. He said he was going to kill the son of a bitch, referring to me.

(Testimony of Ernest Tsang.)

Q. Who did he say that to, or who was present?

A. He said that to my bookkeeper, Lily Tom.

Q. You were present? A. No.

Q. You were not present at the time?

A. No. I was upstairs and the girl came up and told me.

Mr. Karesh: That is highly objectionable.

The Court: The testimony in relation to what was said in his absence will go out.

Q. (By Mr. Hatch): Did anything unusual occur that day?

Mr. Karesh: What day are you indicating?

Q. (By Mr. Hatch): Do you recall the date?

A. It was some time during the middle of December, 1943.

Q. Did Mr. Kan at any subsequent time admit having made the statement of Lily to you?

A. He admitted in the state court that he made such a statement.

Mr. Karesh: Just a minute. This is the most objectionable thing I have ever heard of to say that he admitted it in the state court.

The Court: Let us proceed orderly.

Mr. Karesh: I don't know whether it was said or not in the state court but he has no right to bring that out in this proceeding.

The Court: Did you fix the date?

A. I don't remember the exact date.

Q. (By Mr. Hatch): Did something unusual happen later that day?

A. Just the episode with the gun.

(Testimony of Ernest Tsang.)

Q. You said the girl came upstairs.

A. She came upstairs to warn me.

Q. Did you go downstairs?

A. No, I did not.

Mr. Karesh: I move that that be stricken out as hearsay.

The Court: It may go out.

Q. (By Mr. Hatch): Subsequent to the month of December, namely, on the 24th of January, 1944, there was a meeting in my office?

A. That is correct. [112]

Q. You heard my testimony this morning on that subject? A. I did.

Mr. Hatch: I wonder if in the interest of time I might ask the witness if his testimony would be the same as mine.

Mr. Karesh: That would be absolutely objectionable.

Q. (By Mr. Hatch): At that first meeting the persons present were George Chew, John Kan, yourself and myself, and no one else?

A. That is correct.

Q. Was there any discussion at that meeting as to a contract with John Kan?

A. There absolutely was not.

Q. Was there any discussion about any rights under the GI Bill of Rights?

A. None whatsoever.

Q. Or any federal rights to go back?

A. None whatever.

(Testimony of Ernest Tsang.)

Q. Did Mr. Kan state that he had any right to go back or the right to go back except that he wanted to go back? A. No.

Q. What was the discussion if any about the basis upon which he would return?

A. Are you referring to the first meeting?

Q. Yes.

A. He said he would like to get \$750 per month if possible, but if not he would return for \$500 a month. [113]

Q. What was said by you or George Chew as to the amount you were willing to pay him?

A. Both of us were in agreement as to Mr. Kan having \$500 a month.

Q. What did Mr. Kan say in response to that?

A. He said it was satisfactory with him.

Q. Was there a firm offer at that time by you, that is, positive, unequivocal?

Mr. Karesh: I will object to the form of the question.

Q. (By Mr. Hatch): Did you at that time after the discussion had progressed to the point just indicated by you state to Kan that he could return to work at the Cathay House? A. I did.

Q. Effective when?

A. Any time that he wanted to come back.

Q. At what rate of pay?

A. \$500 a month.

Q. What was said about the term of his tenure?

A. As long as he conducted himself as a good employee and tried to get along with everyone his employment would continue.

(Testimony of Ernest Tsang.)

Q. Did he state that arrangement was agreeable to him personally?      A. He said it was.

Q. Did he say that he would return to work?

A. He said that he would.

Q. Did he state any qualification in that regard?

A. He said he wanted to have the approval of Mr. Sidney Romer. [114]

Q. In relation to that meeting what was the discussion about the signing of a document, call it a release or anything else?

A. At that time, you, Mr. Hatch, said that it might be helpful for peace and harmony if he and I each signed some sort of a paper releasing one from the other and agreeing to get along in the future.

Q. Was he asked whether he had any claims of any kind that he wanted to hold out or wanted to assert?      A. Definitely he was.

Q. What did he say?

A. He said that he did not have any claim whatsoever.

Q. He did not mention any rights about reemployment?      A. He did not.

Q. He made no demand that he be employed?

A. Merely, a request, that is correct.

Q. Was there any discussion at that time of any kind in reference to the necessity or the advisability of assigning his stock or interest to his wife or anybody else?

A. I think it was brought out at that time that it might be advisable if he would assign his stock to his wife.

(Testimony of Ernest Tsang.)

Q. Was it made a condition to his being re-employed?

A. No, it was not made a condition; it was merely stated to him that it would be advisable.

Q. From whose standpoint?

A. From the standpoint of all concerned.

Q. Turning to the next meeting a few days later, that was attended by the same parties together with Mr. Romer? Is that correct? [115]

A. That is correct.

Q. Also in my office? A. That is so.

Q. At that time did Mr. Romer state anything about having a contract?

A. Mr. Romer did so state.

Q. What was his statement?

A. As I recall Mr. Romer said that there should be a contract made for the duration of the war or maybe for three years.

Q. Did he state whether Mr. Kan would return to work if he was not given such a contract?

A. He said that he would certainly advise Mr. Kan not to return to work unless there was that contract.

Q. Did Mr. Kan state that was his viewpoint in view of advice of his counsel? A. He did.

Q. What did he say?

A. He said that he was in accord with his counsel.

Q. There was practically nothing else discussed? A. That is correct.



(Testimony of Ernest Tsang.)

Q. Did you state that so far as you were concerned you were unwilling to make any such concession as to give him a written contract for an extended period of time? A. I did.

Q. Was there any discussion in that meeting about the necessity [116] of his assigning his stock?

A. No.

Q. Was there any discussion at that meeting about the amount which Mr. Kan wanted or would be paid if he got the contract?

A. Yes, the sum of \$500 per month.

Q. Following that meeting did you have one or more discussions with Mr. Kan in the absence of these other parties?

A. Yes; all of them unpleasant.

Q. (By Mr. Karesh): Tell us what you mean.

A. It was very unpleasant for me; he would come in and make threats and use foul language.

Q. (By Mr. Hatch): Did he at any time following the meeting of January 24 offer to return to work without the prerequisite stated by Mr. Romer in that second meeting, namely, that he have this contract? A. He did not.

Q. The discussion in *these* subsequent meeting was concerning whether you would sell out to him or he would sell out to you?

A. Yes, we did discuss that.

Q. As you said you were unable to get anywhere on that? A. Yes.

Q. He wanted you to sell out to him, a minority stockholder, is that correct?

(Testimony of Ernest Tsang.)

A. On one of the occasions he placed such a high price on his \$1100 investment that I could not begin to buy him out. He wanted \$35000 for his interest. [117]

Q. Is it correct to state that at no time following the two meetings in my office did Mr. Kan ever state or indicate to you that he would go back to work at the Cathay House for the sum of \$500 a month? A. That is correct.

Q. And the same question in relation to the sum of \$750 a month? A. That is correct.

Q. And the same question in relation to any sum whatsoever? A. That is right.

Q. And the same question in relation to his willingness to go back to work without a written contract for a minimum period of three years?

A. That is correct.

Q. Is it true that you have never withdrawn the offer—put it this way: Is it true that you have never withdrawn or indicated to Mr. Kan or his attorneys a withdrawal of the offer that was made in my office on January 20 to take him back?

A. That is correct.

Q. I will ask you if at the time of these meetings in my office or immediately thereafter Mr. Kan indicated to you that he would go back to work on a basis of \$500 a month without a written contract for an extended period would you have accepted him and re-employed him? A. I would have.

Q. Following the meetings did you file a suit against John Kan for declaratory relief? [118]

A. I did.

(Testimony of Ernest Tsang.)

Q. And endeavor to bring to a head his claim?

A. That is correct.

Q. As to whatever rights he might assert?

A. Yes.

Q. You have prosecuted that litigation to a conclusion to the best of your ability?

A. That is correct.

Q. Did you enter a bid at the receivership sale?

A. Yes.

Q. You were proclaimed by the receiver as the highest bidder in competition with Mr. Kan?

A. That is correct.

Q. You bought the physical assets?

A. I did.

Q. And since the date of that sale you have and are still operating the Cathay House as a member of the partnership with two other gentlemen, Frank Fong and Philip Fong?

A. That is correct.

Q. That is the present management?

A. Yes.

Q. Those gentlemen have their money invested in there as well as you?

A. Yes.

Q. They are not dummies for you; they are standing on their own? [119]

A. That is correct.

Q. They put in their money originally in the corporation before the partnership was formed, didn't they?

A. They did.

Q. Essentially the present operation of the partnership is that of the previous partnership with the exception of four people, Mr. and Mrs. Kan and

(Testimony of Ernest Tsang.)

the other two who asked the Superior Court for the liquidation of the business?       A. Yes.

The Court: We will take a recess.

Mr. Karesh: I would ask that this witness come back after this wedding.

Q. (By Mr. Hatch): Can you be back?

A. The wedding is at 1:30 in Oakland and I will return soon thereafter.

(A recess was taken until 2 p.m.) [120]

Afternoon Session—2:00 P.M.

Mr. Hatch: I understand the cross-examination of Mr. Tsang will be resumed when he gets back to court.

At this time the defendant offers in evidence certain documents. These are records that I had certified at noon. The first is the complaint for accounting and dissolution of partnership and for a receiver, entitled "John Kan, Helen Kan, George Chin, and Fred Leong, Plaintiffs, vs. Ernest Tsang, et al.," filed in the Superior Court of the State of California in and for the City and County of San Francisco, on February 13, 1946, and numbered 349,840. All of these documents that I am offering are certified copies of originals on file with the County Clerk in that proceeding.

Mr. Karesh: Objected to as immaterial, irrelevant, and incompetent.

The Court: What is the purpose of the offer?

Mr. Hatch: I have an affirmative defense pending.

This is in connection with the receivership. My contention in the argument I have already made to the court is that Mr. Tsang cannot be legally and morally held upon this judgment in view of the receivership, the fact that the claim here presented should have been against the receiver, and that such claim has been waived deliberately by the plaintiff in the action. If Mr. Tsang is held for any judgment from the partnership, I wish to say that the partnership is beyond the control of Mr. Tsang through and at the instance of the plaintiff; and that at his very instance the court over there prescribed the time within which claims were to be filed, and Mr. Kan has waived his claim against the partnership.

Mr. Karesh: The complaint speaks for itself, your Honor; we are suing Ernest Tsang, General Partner, and he is liable.

The Court: For the limited purpose of the offer I will allow it, subject to a motion to strike and over your objection.

(Complaint for accounting and dissolution of partnership and for receiver is marked Defendants' Exhibit A, in evidence.)

Mr. Hatch: The next document I offer is the order appointing a receiver, filed on June 3, 1946, appointing Charles T. Butterworth receiver of the assets and business of the Cathay House.

Mr. Karesh: Our objection will go to all of these documents.

Mr. Hatch: It is so understood.

The Court: It may be admitted.

(Order appointing receiver is marked Defendants' Exhibit B in evidence.)

Mr. Hatch: The next document is entitled, "Interlocutory judgment of dissolution of partnership," filed August 8, 1946, reciting that it is pursuant to stipulation of the parties in open court, and including in the decree, "It is hereby [122] Ordered, Adjudged and Decreed as and for an interlocutory judgment, that the partnership known as 'The Cathay House be and the same is hereby dissolved.'"

The Court: It may be admitted and marked.

(Interlocutory judgment of dissolution of partnership is marked Defendant's Exhibit C in evidence.)

Mr. Hatch: The next document in the same case is entitled, "Order for sale," dated and filed August 8, 1946, ordering the receiver to sell the assets and to return the receipts of the same to court.

The Court: It may be admitted and marked.

(Order for sale was marked Defendants' Exhibit D in evidence.)

Mr. Hatch: Next a document entitled, "Order fixing time to file claims," which is dated and filed August 8, 1946, and provides that all claims be filed with the Clerk of the court on or before August 20, 1946; that if claim is not filed within such time and in such manner it will be excluded from considera-



tion and debarred from assertion against the receiver in this matter, the partnership known as The Cathay House, the partners and the assets thereof."

The Court: It may be admitted and marked.

(Order fixing time to file claims was marked Defendants' Exhibit E in evidence.)

Mr. Hatch: The next document is entitled "Receiver's bill [123] of sale executed on August 30, 1946, by the receiver and filed in court on September 13, 1946, reciting that the highest bid in open court was the bid of Ernest Tsang, for \$25,100, which had been accepted as the highest bid, and pursuant to which the physical assets of the partnership were sold to Ernest Tsang for that sum.

The Court: It may be admitted and marked.

(Receiver's bill of sale was marked Defendants' Exhibit F in evidence.)

Mr. Hatch: Next I have not a certified copy, because for some reason or other the original is not in the County Clerk's file; I have had some difficulty collecting the files, because the case is still pending in Judge Foley's court; he is away on a vacation. This is an order for partial distribution.

Mr. Karesh: I will stipulate that you may use the copy.

Mr. Hatch: By stipulation, it was ordered in the month of October, 1946, that \$97,000 of money on hand with the receiver be distributed pro rata amongst the partners, out of which Mr. Kan received \$10,000, and his wife, Helen Kan, received \$1,000.

Mr. Karesh: How much did Mr. Tsang get?

Mr. Hatch: Mr. Tsang got \$53,000.

The Court: It may be admitted and marked.

(Order for disbursement of funds is marked Defendants' Exhibit G in evidence.)

Mr. Hatch: The next document, Claim of John Kan, is not [124] certified for the reason it was given to the receiver instead of filed with the court; the copy is a true copy on the stationery of Mr. Romer and his associates representing John Kan.

I call your Honor's attention to provision No. 3 of this claim which was filed, as your Honor can see, under that order that provided that they file within a time or they were forever disbarred in connection with this business, and, mind you, all of these proceedings are under the stipulation of the parties.

No. 3 reads:

"Amounts claimed in cross-complaint in Action No. 333,586, now pending and undetermined in the District Court of Appeal of the State of California, in the First Appellate District and itemized in the cross-complaint on file in said action as follows:

(a) For loss of wages \$7870.

(b) For damages for fraud \$25,000.

(c) For costs of suit, estimated at \$250."

I would like that to be received in evidence. Mr. Romer testified that he thought a claim was filed in connection with this pending action, and I think

that upon examination of that document he will find that it was filed in the action which was tried before Judge Deasy. Is that correct, Mr. Romer?

Mr. Romer: I am not certain what was included in this particular claim, other than from your reading it.

Mr. Hatch: I can state to the court that no other claim [125] but that was filed with the receiver.

The Court: Is that satisfactory?

Mr. Karesh: If he says so I will accept the statement. My objection is still made as to it.

The Court: It may be admitted and marked.

(Claim of John Kan was marked Defendants' Exhibit H in evidence.)

Mr. Hatch: I now wish to offer in connection with the plea of *res adjudicata* a document which was received by the court at the time that we were pre-trying the affirmative defense; the document was received in evidence on May 27, 1946, and marked Defendants' Exhibit A, and I would suggest it now be assigned a new number.

Mr. Karesh: We ask that this be not received. Your Honor has already held that the plea of *res adjudicate* is not available here.

The Court: When did I decide that?

Mr. Karesh: Your Honor may recollect that originally Mr. Scholz was here——

The Court: The record will disclose.

Mr. Karesh: Yes, I am sure the record will disclose that we asked the court to vacate the order holding the receiver a party, and your Honor entered such an order.

Mr. Hatch: You are technically correct.

Mr. Karesh: There was a judgment of decree that it was [126] *res adjudicata*.

Mr. Hatch: It was never signed.

Mr. Karesh: We filed this motion, your Honor, on July 9, 1947. "Notice of motion to vacate order and for reconsideration. Notice is hereby given that on Monday, July 14, 1947, the Petitioner will move the above-entitled court for its order vacating its order made July 7, 1947, dismissing this action on the ground that it is *res adjudicata*.

"Said motion will be based upon all the papers, records and files in this action, and upon the ground that the court erred in making the above order holding that because a suit had been entered in the California State Court between Ernest Tsang, Plaintiff, vs. John Kan, Defendant, and the judgment therein having become final, that the action before this court has been finally adjudicated."

Thereafter, on the 14th, the order to dismiss proceedings was vacated.

The Court: No matter what happened before, and what had gone on before, they are not precluded now from offering any defense they have.

Mr. Karesh: We will object on the ground that the plea of *res adjudicata* is not a proper plea and should not be received in evidence. I will object to the offer of the document.

The Court: What is the purpose of the offer?

Mr. Hatch: On the affirmative defense of *res adjudicata*. [127]

The Court: The objection is overruled. It may be admitted and marked.

(Exhibits on plea of *res adjudicata* and plea of another action pending were marked Defendants' Exhibit I, in evidence.)

Mr. Karesh: Will you tell what documents there are?

The Court: He has offered them in evidence, and I have allowed them in subject to your motion to strike and over your objection.

Mr. Hatch: I now request counsel and Mr. Kan to produce that certain document, a copy of which appears to be contained on page 51 of the deposition of John Kan, and begins with the caption, "Meeting at Hatch's Office January 20."

Mr. Karesh: Now, I am very sorry that counsel handled this case in the manner he did for his own sake, because there was an opportunity for discovery that he could have made long before this proceeding and had Mr. Kan produce the document. I do not know anything about the document. I asked Mr. Romer a few weeks ago and he asked Mr. Kan—maybe Mr. Romer can answer that question.

Mr. Romer: Mr. Kan does not appear to have it.

Mr. Hatch: I am establishing as your Honor may well see as a predicate for the production of secondary evidence. [128]

ROBERT E. HATCH

Direct Examination

(Resumed)

The Witness: I think I concluded with what was said at the two meetings. Following that time Mr. Kan was in my office on January 3, 1945, and January 11, 1945, shortly less than one year after the two meetings that I have discussed.

At that time I interrogated Mr. Kan, who was under oath, as to what he recalled of the substance of what was said and done at those two meetings. His reply was——

Mr. Karesh: Your Honor, counsel should have asked Mr. Kan while he was on the stand, "did you not testify in my office on whatever date it was if he had said so and so." Having failed to do so he cannot impeach my witness. That is elementary.

Mr. Hatch: I do not think that is the law, but if your Honor rules that it is, I would ask to recall Mr. Kan and go over this.

The Court: I think it would be best.

Mr. Hatch: I will ask then that Mr. Kan take the stand.

The Court: Let the record show that he is called back. [129]

JOHN J. KAN

recalled.

Recross-Examination

By Mr. Hatch:

Q. Mr. Kan, do you recall being in my office two times, on or about January 3, 1945, and January



(Testimony of John J. Kan.)

11, 1945, when your deposition was being taken in the case of Tsang vs. Kan?

A. I don't remember the exact dates, but I do remember that in January I did go to your office for the deposition.

Q. And at that time you were accompanied by your counsel, I believe, Judge Ames and Mr. Romer?

A. I believe so.

Q. You were sworn as a witness in this matter to tell the truth, the whole truth, and nothing but the truth by Alfred D. Martin, a notary public?

A. I remember that very distinctly.

Q. Thereupon you were interrogated by counsel, Judge Ames and myself, is that correct?

A. That is correct.

Q. I will ask you if at that time and place you were asked the following questions and gave the following answers——

Mr. Karesh: Show him the transcript.

The Court: Let him read them.

Mr. Hatch: Beginning on page 22.

Mr. Karesh: You understand he is going to cross-examine you, he is going to ask you as to matters in that transcript. [130]

Mr. Hatch: I wonder if a better way would not be for counsel to read the questions and answers. I will read the questions and answers if the court will permit.

Mr. Karesh: Is that Kan's deposition?

Mr. Hatch: Yes, and if there is anything in

(Testimony of John J. Kan.)

here that is wrong you will stop me. Otherwise, I will assume it is correct:

“Q. You remember the occasion of the meeting in this office on January 20th?

“A. I do.

“Q. The general subject was the possibility of your returning to work, wasn't it?

“A. It wasn't the possibility. It was the promise under which I was to return to work.

“Q. All right. Will you state your version at this time of what position you took then, as to what you wanted or thought you were entitled to, or anything of that sort?

“A. It wasn't what I would want; it was what I was promised.

“Q. All right. Will you state what you then said as to what you had been promised.

“A. Yes. I told Mr. Tsang that I was discharged from the army, and I didn't think there was any possibility for me having to go back into the army; and naturally, I wanted to go back to my former position.

“Q. Do you recall whether at that time you were asked whether [131] you claimed you had any agreement that entitled you to do so?

“A. Yes. Mr. Tsang and I discussed that very thoroughly at the luncheon.

“Q. You don't follow me. I am asking you now as to what you said on January 20th here in my presence, as to whether you had any agreement or on what basis you claimed the right to return to

(Testimony of John J. Kan.)

work—whether it was something said by the employer or otherwise?

“A. I don’t remember. I think you are the one that conducted most of the discussion.

“Q. Would you say or would you deny that at that time you stated in the meeting that you did not claim there had been any agreement to take you back?

“A. I don’t think I made any statement of that kind.

“Q. Do you remember what position Mr. Chew took in reference to your coming back?

“A. Well, Mr. Chew was a sort of a business adviser to Mr. Tsang, as Mr. Tsang told me; and Mr. Chew’s attitude before we come into your office——

“Q. Not before you came in. What position did he take in our mutual presence in reference to whether you had the right to come back or whether you should come back; and if so, what terms?

“A. I don’t know. Mr. Tsang has always referred to Chew as his business adviser; and I just took it for granted that [132] he came in here in the capacity of a business adviser.

“Q. All right. After he came in here in whatever capacity it was, what, if anything, did Chew say as to his disposition toward your return?

“Mr. Ames: Do I understand here today that Mr. Chew would have had anything to say about it?

“Mr. Hatch: That was not the point of the question. It is a statement that was made in the

(Testimony of John J. Kan.)

presence of this litigant; and I want to know what it was; and what response, if any, Mr. Kan made in regard to it.

“A. I don’t remember.

“Mr. Ames: If he remembers.

“A. I don’t remember.

“Mr. Ames: He doesn’t remember anything like that.

“Q. (By Mr. Hatch): You don’t know what position Mr. Chew took about your return?

“A. No, not his; but I remember what he told me when we left the office.

“Q. Well, all right. Tell me what he said after you left the office.

“A. Well, Mr. Chew said out in the street——

“Q. This was in the presence of Mr. Tsang?

“A. No, Mr. Chew and myself.

“Q. All right.

“A. He said he was glad to see the matter thrashed out; and he said he didn’t see any necessity [133] for any controversy; and he referred to the success of the business; also complimented me upon the good work I had done in building up the business; and he felt that there should be no friction between Tsang and myself.

“Q. Anything else?

“A. That is all I can remember of that is of importance.

“Q. What position did Mr. Tsang take in the meeting?

(Testimony of John J. Kan.)

“Mr. Ames: You mean what did Mr. Tsang say?

“Mr. Hatch: Yes.

“Mr. Ames (Continuing): In the meeting? You can't state what position he took; but what did he say out loud.

“A. I can't remember what he said.

“Q. (By Mr. Hatch): How did the meeting end?

“A. It ended with—You are referring to this meeting that Mr. Romer wasn't present at?

“Q. Yes, that is correct.

“A. I think it ended by mutual agreement between us that I should have Mr. Romer present at the next meeting. I believe that was the idea.

“Q. Was there at that meeting any expression of either a willingness to take you back or a refusal to take you back?

“Mr. Romer: May I ask that be clarified so that Mr. Kan will know which of the two you are referring to?

“Mr. Hatch: I am referring to the January 20th meeting. [134]

“Q. In other words, how far along did the meeting get before it was postponed until we could talk to Mr. Romer?

“A. Well, I believe we reached the point where you discussed the—my reemployment; and you stated that at no time did Mr. Tsang consider re-employing me.

(Testimony of John J. Kan.)

“Q. I seem to have some difficulty. Maybe you don’t understand what I am trying to reach; and maybe you don’t recall the detail. Let’s see if I can get at it this way: What did you have in your mind as an impression at the time that the meeting adjourned on January 20th, as to whether you were going to get a job at the Cathay House or not?

“Mr. Ames: Well, I haven’t made any objections, Mr. Hatch, to the form of your questions, although I think they are entirely incompetent questions. It isn’t a question of what a man has in his mind; it is a question of who said what.

“Mr. Hatch: That is what I want.

“Mr. Ames: And what was done.

“Mr. Hatch: I agree with that wholeheartedly; but Mr. Kan hasn’t told us yet just what occurred; and I thought maybe an expression of his viewpoint would reflect what he heard.

“Mr. Ames: Why don’t you——

“Mr. Hatch: I was trying to get at it that way.

“Mr. Ames: Why don’t you ask the direct question, [135] did they tell him they would take him back at that meeting?

“Q. (By Mr. Hatch): All right. Let’s answer that question.

“Q. (By Mr. Ames): Did they tell you they would take you back into the employment of the Cathay House, Mr. Kan?

“A. I don’t think there was anything definite about taking me back.



(Testimony of John J. Kan.)

“Q. (By Mr. Hatch): All right, Now——

“A. It was all very vague.

“Q. We are coming closer to the point. That is what I am trying to develop. What was said and by whom at that time that indicated to you there was a possibility of your returning to work?

“A. Well, I have to refer to my notes on that. I can’t——

“Q. To help yourself?

“A. I don’t have them with me now.

“Q. (By Mr. Ames): Did you make any notes?

“A. Yes.

“Q. Shortly after the time?

“A. Yes. I have some notes at home, and I didn’t bring them along.”

Q. Is that about right up to that point?

A. I can’t remember all that word for word. It is very complicated.

The Court: Is there anything in what he has stated that you have in mind now that would change your testimony? [136]

A. No, I think that is pretty close.

Q. (By Mr. Hatch): Then you went home and came back two days later with a document, didn’t you?

Mr. Karesh: I don’t see any impeachment so far. He has not impeached him at all.

Mr. Hatch: I show you your deposition at page 51, is that a copy of the document that you went home and wrote out after the first meeting?

A. I believe that is the memorandum.

(Testimony of John J. Kan.)

Mr. Karesh: Are you going to offer that in evidence?

Mr. Hatch: Yes.

Mr. Karesh: I will object to that, he cannot offer that memorandum.

The Court: The objection will be overruled.

Mr. Karesh: I don't see how it could be introduced in evidence.

The Court: He showed it to him and he said that is the memorandum. Proceed.

Q. (By Mr. Hatch): The situation is now, so we understand it correctly, Mr. Kan, that after the meeting in my office on January 20th, either the same day or just a few hours afterwards, you went home and wrote out a memorandum of the meeting of January 20th?

A. Will you repeat that?

Q. You had a meeting in my office on January 20, 1944, and we [137] discussed the matter at length. Do you recall that?

A. Yes.

Q. You had no attorney present?

A. That is right.

Q. So after you left the office, either that day or the next day at home, you wrote out a memorandum of what occurred at that meeting in order that you would have a record of it?

A. No, it was not for a record. I don't know whether I wrote down everything that occurred, or not, it was just for myself.

The Court: You read that memorandum?

A. Yes.

(Testimony of John J. Kan.)

Q. Is that the memorandum? A. Yes.

Mr. Hatch: Was it written on a typewriter, or in pencil? A. It was scribbled in pencil.

Mr. Hatch: Now, I wish to read that document, your Honor.

The Court: Proceed.

Mr. Karesh: My objection is going to all of this.

The Court: I think the record discloses that. The objection is overruled. Proceed.

Mr. Hatch: "Meeting at Hatch's office, Jan. 20.

"Hatch: Refers to Ernie's entry into corporation as minor Stockholder and gaining control of majority of stock on account of my not having Capital, etc. That there were some mistakes in forming the corporation—in that we had [138] no permit to issue stock. That partnership was not Ernie's original idea, since I had discussed it with him—and that when it was changed to partnership apparently had my approval even though done in my absence.

"Said it would be difficult for me to come back and work on employee basis without some dissatisfaction (1) Suggests agreement on employee basis. (2) That since limited partner cannot be active, I place my shares in my wife's name. (3) Asks about duties—whether managerial or other.

"Ernie: Replies that 'just go back to work'.

"Chew: Refers to salary.

"Ernie: Refers to discussion between he and I.

"Hatch: Says salary was between Ernie and myself.

(Testimony of John J. Kan.)

“I said wanted my attorney to be present, and there was no use drawing up contract until I thought it over in regard to the new angles thrown upon the matter as explained by him.”

Q. Now, in this same deposition you were interrogated as to your recollection of the second meeting, that is the one of January 24, were you not?

A. Yes.

Q. Now, beginning on page 16—and I might ask Mr. Kan, if you find anything wrong about this call my attention to it. Page 36 of the deposition, beginning with line 14:

“Mr. Ames: How much longer are you going to take? [139]

“Mr. Hatch: Oh, a few minutes.

“Q. Do you have any recollection of what transpired at the January 24th meeting other than what you have testified to? A. No, I don't.”

Mr. Karesh: I think this is a highly improper method of attempting to impeach a witness.

The Court: I am responsible for the conduct of this trial.

Mr. Karesh: For him to read several pages of transcript at once?

Mr. Hatch: You are wrong in your statement. The memorandum is embodied in one page.

Mr. Karesh: That counsel read, one page?

The Court: Yes, that counsel read, the memorandum.

(Testimony of John J. Kan.)

Mr. Karesh: I do not mean the memorandum. I am referring to prior to that time.

The Court: In any event, proceed.

Mr. Karesh: Will you tell me on what page you started reading the testimony so I can follow you?

The Court: He read it.

Mr. Karesh: He didn't tell me the page. What page did he start with? I have some difficulty in looking at the transcript in following him.

Mr. Hatch: I began on page 22, line 4, and I read the deposition down to where he concluded the first conversation of [140] January 20th, and it was subsequent to that testimony he had no recollection.

Mr. Karesh: No recollection of what?

Mr. Hatch: He didn't have a recollection of anything at the time. I am not trying to make him out a liar, I am merely saying that his recollection is very unsatisfactory.

The Court: It is time for recess.

(Recess.)

Mr. Hatch: Counsel wanted to know where I was reading from the transcript. I read from page 22 line 4 to and including line 3 on page 27. I will now read from page 31, line 3:

"Q. All right. When he came here on January 20th, isn't it a fact that Mr. Tsang said to you in the presence of Mr. Chew and myself that he was agreeable to your returning to work at the Cathay House?

"A. Well, I don't remember. I will have to—I will have to refer to those notes that I made."

(Testimony of John J. Kan.)

On the same page, 31, beginning at line 18:

“Q. Is it your position at this time that without your notes, you are unable to recall with accuracy what was said at the meeting of January 20th?

“Mr. Ames: I think that is what he has said several times, Mr. Hatch, already.

“A. That is right [141]

“Mr. Hatch: Q. All right. That is what I understood him to say. He now answers ‘That is right.’”—that he does not recollect what was said without getting his notes. That was in answer to the question:

“Is it your position at this time that without your notes, you are unable to recall with accuracy what was said at the meeting of January 20th?

“Mr. Ames: I think that is what he has said several times, Mr. Hatch, already.”

And the answer by the witness is, “That is right.”

Now the question:

“How about the meeting of January 24th in this office? Do you have any recollection of that without studying your notes to refresh your recollection?

“A. (Addressing counsel for the defendant): Have we notes on that?

“Mr. Romer: Here is a memorandum.”

Then resuming at page 32, line 11:

“Mr. Hatch: Q. The notes you speak of concerning the January 20th meeting were about when?

“A. Made the same evening.

“Q. In your handwriting? A. Yes.

“Q. About how many pages?

“A. Oh, two pages, I suppose. [142]



(Testimony of John J. Kan.)

“Q. Now, I have asked you about the meeting on January 24th. Do you recall coming to this office about 3:00 o’clock in the afternoon of that day with Mr. Romer and Tsang and Mr. Chew being present, together with myself?

“A. Yes, I remember that.

“Q. Are you able to testify as to anything that occurred or was said during that meeting without refreshing your recollection?

“A. Well, we came here with the impression that we were going to sign a contract of agreement—a contract of employment—rather. Correction.

“Q. That was your impression? A. Yes.

“Q. Generally speaking, what were the terms of that contract you expected to sign?

“A. Oh, I think reference was made by you only to my signing a release of all claims against Mr. Tsang.

“Q. Before you go to that, we are talking about a contract of employment, and you said when you came on January 24th, you expected to sign such contract?

“A. I expected a discussion to be on the contract of employment.

“Q. A discussion on the contract of employment? A. Yes.

“Q. What did you have in mind then as to the terms of that [143] contract? What did you expect that contract to contain?

“A. I expected to get a contract of employment

(Testimony of John J. Kan.)

to contain a clause of employment for three years at the Cathay House.

“Q. At what salary?

“A. At \$500.00 a month.

“Q. Did you have any discussion on that subject with either Chew or Tsang or myself after the meeting of January 20th and before the meeting of January 24th, except the conversation with Chew outside the office which you have already testified to?

“A. No, there was no conversation between us in that period.

“Q. As I understand it, after the January 20th meeting, you went home that night and made some notes; and between that and the 24th, you discussed the matter with Mr. Romer, and then you came over here on the 24th, is that correct?

“A. That is right.

“Q. Would you deny at this time that on January 20th, I asked you whether there had ever been any agreement to return you to any particular job at any particular salary after your discharge from the army?

“A. Will you say that again?

“Mr. Hatch: Read it.

“(Question read by reporter.)

“A. No, I don't remember.

“Mr. Hatch: Q. On January 20th did you express either [144] a desire or a demand during the meeting that you have a contract for a specified period of time?

(Testimony of John J. Kan.)

“A. Why, I told you, Mr. Hatch, I couldn’t remember exactly what went on in that meeting.

“Q. Well——

“A. And I can’t make a statement on that until I see my notes.

“Q. You don’t recall that one way or the other at this time?

“A. Not at this time, no.

“Q. Let us put it this way: In the month of December of 1943, did you at any time express a willingness to return to Cathay House and go to work pending a decision as to what your rate of pay would be? A. I did.

“Q. You did agree to do that? A. Yes.

“Q. And who was to make the decision as to the rate of pay?

“A. Mr. Tsang was to see Mr. Chew and get his approval.

“Q. And did you agree that you would be bound by either their decision or that you would resolve your own opinion on the subject? Do you understand the question?

“A. Will you say that again?

“Q. Yes. Did you agree that you would accept whatever wage they decided you should have?

“Mr. Ames: Q. In other words, did you say so to [145] anybody?

“Mr. Hatch: That is right.

“A. Well, here is the way the discussion went on. As I told you before, we discussed whether the salary would be \$500.00 a month or \$750.00 a month;

(Testimony of John J. Kan.)

and Mr. Tsang said that he would see Mr. Chew about it; and it was my suggestion that I come back to work pending their decision as to whether the salary would be \$500.00 or \$750.00 a month.

“Mr. Hatch: The range was between those two limits, so far as you were concerned?”

“A. Yes.

“Q. Without refreshing your recollection from any notes, can you remember at this time whether on January 20th I asked you if you had any claims against the Cathay House or Mr. Tsang other than the right to go back to work? Do you remember any discussion of that? A. I don’t.

“Q. Do you remember any discussion about the desirability of getting a release from you at that time of any claims that you might assert?”

“A. Yes, I remember your discussing a release—my signing of a release of all claims against Ernest Tsang. For what reason, I don’t know.

“Q. Do you not recall that I asked you whether you had any claims except the right to go back to work, you [146] said no?”

“A. I don’t remember that.”

Mr. Karesh: I think that this is a highly improper method of attempting to impeach the witness. He has been permitted to run along—how many pages did you read? Would you say twelve?

Mr. Hatch: I would say twelve.

Mr. Karesh: This is highly improper, your Honor. The only proper method would be to ask the

(Testimony of John J. Kan.)

question, and if he said he didn't remember give him a chance to explain why he didn't remember.

The Court: You can take him on cross-examination and develop that fact. Proceed.

Mr. Hatch: "Q. Do you not recall that I asked you whether you had any claims except the right to go back to work, and you said no?

"A. I don't remember that.

"Q. You don't remember that. Do you deny that at that meeting you said you didn't have any other claims, but you would not sign anything in writing to that effect?

"A. No, I don't remember that I—I remember saying that I didn't want to sign any release.

"Q. All right. Do you remember the expression being used by me at that time that bygones should be left as bygones, something to that effect?

"A. I think you said something to that effect.

"Mr. Ames: How much longer are you going to take?

"Mr. Hatch: Oh, a few minutes. [147]

"Q. Do you have any recollection of what transpired at the January 24th meeting other than what you have testified to?

"A. No, I don't.

"Q. Did you make any notes of that meeting yourself? A. No, I didn't.

"Q. Do you remember what position you took or demands you made, if any, at that meeting?

"A. I remember I came in here expecting to discuss the contract of employment.

(Testimony of John J. Kan.)

“Q. But you don’t remember of any demands or claims that you made? A. No.

“Q. As a matter of fact, since you left the service you never have returned to work at the Cathay House? A. No.

“Q. After the meeting of January 24th, was there any discussion between you and Tsang or Chew or any others connected with the Cathay House about your returning?

“A. Yes, there was.

“Q. One or more conversations?

“A. One or more conversations? About a half a dozen conversations.

“Q. In the absence of Mr. Romer and myself, I presume?

“A. Yes. Between Mr. Tsang and myself. [148]

“Q. What was the substance of those conversations?

“A. Well, there was one conversation I remember that Mr. Tsang discussed with me the contract of employment; and I told him that I couldn’t sign a release of all claims against him, because, naturally, I would be forfeiting my rights.

“Q. So——

“A. Whereupon we entered into a discussion about buying and selling—either one buying the other out.

“Q. Did you ever get to the point of agreeing on what your salary would be if you should return, and I am talking now after these later conversations?

“A. Yes, of course, several times. I went back to



(Testimony of John J. Kan.)

see Mr. Tsang several times, and it was just continued procrastination. One time it was one thing and one time it was another thing. I couldn't get to first base with him.

"Q. You said you never could get to first base. Did you ever reach with him any understanding as to what pay you would receive if you were taken back?

"A. Yes, I told him I was perfectly agreeable to go back at \$500.00 a month several times.

"Q. And he never agreed to that? A. No.

"Q. Is that correct?

"A. Well, he would say that he would, and then he said that he would—he would say that would be all right. The [149] next time you would go back, and he would have another change of attitude. He always seemed to be kind of off on a limb."

Then at page 42, beginning at line 17, this being when Mr. Kan came back a week following for a continuance of the deposition:

"Q. Mr. Kan, your counsel has handed me a typewritten copy of one page of what purports to be your notes of the meeting in this office on January 20th of last year. Have you a copy of that before you? A. Yes, I have.

"Q. The original of this document was in your handwriting, was it? A. Yes, it was.

"Q. What you have before you is a correct transcription of those notes? A. It is.

"Q. Those are all the notes that you have of any

(Testimony of John J. Kan.)

meeting or meetings on this subject either in this office or with Mr. Tsang?

“A. Yes, those are all the notes I have.

“Q. Then if you don’t mind, I would like when we adjourn to have that copy that you have before you handed to the reporter, and let him copy it as an exhibit to the deposition.

“A. I have no objection.” [150]

Do you want me to read on Mr. Karesh?

Mr. Karesh: Read on.

Mr. Hatch: All right.

“Q. All right. Do you have now any independent recollection of what occurred or was said at either the January 20th or the January 24th meeting in this office other than that to which you have testified, and other than that which is set forth in this memorandum of yours?

“A. Yes. As I recall now, I did not put down the reference to the release of all claims which you referred to on January 20th. I have this listed as one, two and three; and there is no place here where there is a reference to your discussion of the release of all claims which you said was one of the—one of the things that you wanted me to do—wanted me to sign a release of all claims; also have an agreement—a partnership agreement to place the shares in my wife’s name.

“Q. Other than those things you have now mentioned, are there any other exceptions to the longer question I asked you?

“A. No, I don’t believe so.

(Testimony of John J. Kan.)

“Q. Were there any written documents submitted to you in this office at the time of either of these meetings? A. No.

“Q. You spoke of a release. What is your recollection as [151] to when and where, if any, and if at any place any writing was ever submitted to you?

“A. Why, I don't think the thing was discussed very thoroughly.

“Q. When you say 'the thing,' you mean the release?

“A. I mean the writing, the release of all claims or of any partnership agreement, for that was not explained to me; but I had the impression that the agreement of partnership was somewhat of a contract of employment, the terms to be discussed when my lawyer would be present.

“Q. All right. Now, you stated just now what your impression was; and I asked you along that line when we were here before on this deposition, and I will ask you again: What was your impression or state of mind at the time that you left this office on January 20th, as to what was next to be done? What was the next move, in other words?

“A. In the first place, I wanted to have my attorney present; and since he wasn't able to attend that meeting, and there was an entirely new and different angle thrown upon the picture from the time Tsang discussed it with me before we came here, I wanted to think the thing over and discuss it with my attorney; and I did not certainly want to sign anything unless I knew what I was signing; and my

(Testimony of John J. Kan.)

impression was that since Tsang had a contract of employment, that I would receive a similiar arrangement and—— [152]

“Q. Well, was anything said by anybody at the January 20th meeting that you were to have a contract, or was that your impression only? Let me withdraw that question.”

Mr. Karesh: Go on.

Mr. Hatch: There is a colloquy between counsel.

Mr. Karesh: I am not interested in the colloquy.

Mr. Hatch: I will turn to page 48, line 22 and read:

“Q. Coming back to the next meeting on January 24th, do you or do you not recall in your presence, your attorney, Mr. Romer, saying that—or discussing the desirability on your part of having a contract in writing?

“A. I wouldn’t put it that way, because, both Mr. Romer and I were—we were both of the impression that we came here on the 24th for the purpose of discussing the contract of employment.

“Q. When you came on the 24th and before you came into the meeting, what was your idea as to the duration to be specified in any contract?

“A. As I told you before, I expected to have a contract for the same period of time as Mr. Tsang did.

“Q. You say that was your expectation. Now, it was based solely upon your conclusions and not upon anything that was said by anybody present?

“A. Absolutely not. My own conclusion.

(Testimony of John J. Kan.)

“Q. And there was nothing said by anybody that you were to [153] have a contract the same as Tsang’s?

“A. No, as I told you, it was just the impression that I had.

“Q. Do you remember at the second meeting, the one of January 24th, Mr. Romer, discussing with me the purported length of the contract, whether it be for the duration of the war or for three years or for something else of that sort?

“A. I don’t remember the details of that discussion.

“Q. All right. I have one other thing to ask you: At any time did you attempt to get a lease to the Cathay House from the Chinese people or firm who had the lease on the building? Did you attempt to get a lease from them, or any of them, in your own name for the premises occupied by the Cathay House? A. No, I don’t remember.”

Mr. Karesh: That certainly has nothing to do with it, getting a lease.

Mr. Hatch: It certainly has. It as a substantial variance in the testimony of this witness.

Mr. Karesh: I will withdraw the objection.

Mr. Hatch: He testified yesterday that he did not, and away back he did not remember.

Mr. Karesh: He did not say that.

Mr. Hatch: That is all for the deposition, your Honor. I have no further questions. [154]

(Testimony of John J. Kan.)

Further Recross-Examination

By Mr. Karesh:

Q. At the time you made that statement in answer to Mr. Hatch's question at the deposition about you didn't remember, can you explain why you didn't remember?

A. There were several reasons for that. As I recall, I never had any experience in litigation before. My attorney had informed me previously that this was more or less a fishing expedition on Mr. Hatch's part, and he said, "Well, you don't have to answer anything if you don't want to." I did not put importance on the deposition, therefore when the second one was taken I probably didn't remember a lot of things I did not want to remember. Might I explain the memorandum?

Q. Go ahead.

A. That memorandum was for the sole purpose of informing Mr. Romer of what had happened, and that did not happen at that meeting. Mr. Hatch's questions were so involved and going from one point to another he had me all confused, I didn't know really what it was about.

Q. Isn't the reason you did not put down about the release because that had been already indicated to Mr. Romer?

A. That is right, that it was foremost in my mind. I knew I might have to go into court some day and I felt that I would tell my story in court then. I didn't know what a deposition was, frankly, I did not place any importance on it.



(Testimony of John J. Kan.)

Q. Isn't it true that your understanding about the contract [155] was that you were to receive a contract if there was to be a release granted by you?

A. That is what I understood.

Q. Otherwise, you were willing to go to work without a contract if no conditions were imposed upon you, isn't that right?

A. That is right. In fact, Mr. Romer told us at the January 24th meeting, he said, "Let us not have anybody sign any release."

Mr. Hatch: This is something that transpired between Mr. Romer and someone else?

A. They were having a discussion.

The Court: Where?

A. At Mr. Hatch's office.

Mr. Hatch: Was that in the presence and hearing of Mr. Hatch?      A. Yes.

The Court: You may relate it.

A. Mr. Romer suggested at the January 24th meeting that I go back to work without signing or receiving any papers or anything of the sort, and I do not think it was agreed to.

Mr. Karesh: This is probably rebuttal but I could recall Mr. Kan a little out of order.

The Court: Before you go forward, get through with this witness.

Mr. Karesh: I will call him back in rebuttal.

The Court: I will try to dispose of this case as best I can.

Mr. Hatch: I have one further matter to testify to. [156]

## ROBERT E. HATCH

## Direct Examination

## (Resumed)

The Witness: I wish to further testify there was no discussion at either of the meetings of January 20 or 24 about the necessity of Mr. Kan transferring his stock interest to his wife. I am certain of that because the corporation was not involved in the subjects under discussion; it was not operating the business. So far as assigning his interest in the partnership to his wife or to us it was unnecessary, the rule of law being that a limited partner may participate in the operation of the business, but if he does do so he exposes himself to the same liability as the general partner. There is no inhibition against it, therefore there would be no different set up. That is the direct examination.

## Cross-Examination

By Mr. Karesh:

Q. Now, Mr. Hatch, isn't it true that Mr. Tsang would have to hire Mr. Kan?

A. What do you mean?

Q. You advised him that he did not have to, didn't you?

A. That bears absolutely no resemblance to the fact. I advised Mr. Tsang and Mr. Kan to go back and take a trial and try to get along, and undoubtedly they would have done so had there not been a misunderstanding between the parties. If you want me to explain I will; other than that I will leave it to argument. I thought they were both high class

(Testimony of Robert E. Hatch.)

and intelligent persons, and there was no reason why they could not get along, [157] and I not being much older than either of them, I still took a paternal viewpoint in discussing it with them, and I still think that was right, that they should forget these clashes and quarrels of partners and they could have gone on and made a lot of money, and could have worked it out, but that was not what happened, and it was not because of my advice or Mr. Tsang's advice that it did not happen.

Q. Now, Mr. Hatch, you spoke of some writing that you wanted Mr. Kan to sign, some release; what kind of writing was it that you wanted him to sign?

A. I tried to describe it before; it was merely something in writing in an informal fashion that the parties would agree to let bygones by bygones.

Q. Did you want Mr. Tsang to sign it too?

A. Yes, it was a mutual release as previously mentioned.

Q. Did you have the memorandum prepared when you asked them to sign it?           A. No.

Q. But it was in the nature of a mutual release?

A. It was in the nature of a release of any claims actual or fancied; each one assured me that he had no claims against the other. And I figured by doing this that they would not bring up their past unpleasantness.

Q. One of the features of the release was that Mr. Kan was to OK the transfer of the corporation

(Testimony of Robert E. Hatch.)

to the partnership, was it not? That was one of the features was it not? [158]

A. No, definitely not.

Q. What did you mean by suggesting bygones be bygones?

A. As I tried to explain it to these gentlemen at the meeting of January 20, where there was not any legal basis involved, Kan had started and promoted the business; he considered himself to be the father of the organization. However due to some business difficulties they had reached a point where he realized he was in a minority position; he no longer had control of the business. He had publicized himself among the Chinese section and throughout the city that he was the Cathay House, and it was very natural that he should feel unhappy where he was not the main man of the Cathay House.

Q. That happened, that he was not the main man, because they went into the bankruptcy court?

A. Quite the contrary.

The Court: Financial interest.

A. Financial interest. The one thing was when they were getting behind and it needed money to meet the payroll and pay the bills and pay the rent—they were in arrears in the rent for many months; and when times were bad Mr. Tsang was the one that came forward and put the money to carry it along. Either Mr. Kan could not or would not, I don't know, it doesn't make any difference. The result was that from a major position Kan was in an inferior position to the majority stockholders and

(Testimony of Robert E. Hatch.)

it was difficult for him to divorce that high sentiment from a practical viewpoint based upon his legal position. [159] And it was my opinion that that alone was what caused the friction between these gentlemen. I don't think there was anything radically wrong with either, but Kan could not adjust himself to his new position, and as a result there had been bitterness and hostility develop between these two men who were confined to the one room in a restaurant. That was all reviewed with Kan when he came back and was in my office, and I said if you try to get along you can only do it by forgetting what has gone on in the past, and to be sure that that is firmly impressed in your mind I suggest that you write out a little memorandum and each of you sign it and forget everything which previously happened.

Q. (By Mr. Karesh): Mr. Hatch, why was it that you asked him to sign something?

A. It was just a suggestion.

Q. Why did you ask him to sign a document letting bygones by bygones if it was not a release of all claims?

A. I gave you my best answer.

The Court: It would be well for the court to inquire at this time, what claims have you in mind.

Mr. Karesh: Mr. Kan was to waive all his rights?

The Court: What were his rights.

Mr. Karesh: One would be a right to have his old employment.

The Court: That was not discussed.

(Testimony of Robert E. Hatch.)

Mr. Karesh: Whether it was discussed or not his signature [160] on a release would have had the effect of tolling his rights under the Selective Service Act.

The Court: I am not sure about that.

Mr. Karesh: To ask a man to sign a release and waive his rights under the Selective Service?

The Court: Under the circumstances the important thing to keep in mind the conduct of the parties and their actions, and as far as the testimony discloses there was not anything disclosed in relation to the release.

Mr. Karesh: That is the conflict.

The Court: I have in mind only what the testimony discloses. However, proceed.

The Witness: I would like to complete my last answer. There was some discussion. Had there been any claim brought to my attention that Kan had a right under the Selective Service Act the whole thing would have been approached from a different standpoint. I did not know of it; I don't think Mr. Kan did; if he did he never communicated it to us. The first I knew there was any possibility of such a right was when they filed the cross-complaint in the state court before Judge Deasy and asserted rights under the Selective Service Act. I had never heard of it before. I had asked Mr. Kan if he had any claim and he said no. If he had told me he had that would have covered that.

The Court: When was the suit filed in the Superior Court by Mr. Tsang? [161]



(Testimony of Robert E. Hatch.)

A. I can give you the exact date. The complaint is there as an exhibit. It was filed October 21, 1944.

Q. (By Mr. Karesh): Is it your testimony that you had no knowledge of Mr. Kan's claim under his Selective Service rights prior to the filing of that suit?

A. The meeting was in January; that would be approximately correct. If there was anything intervening it was only the discussion I had with you and I don't know when that was.

Q. Didn't we make a demand upon you or request upon you to have Mr. Tsang rehire Mr. Kan under the Selective Service Act, and didn't you write us a letter, which is dated March 27, 1944? This is six months prior to October. A. Yes.

Q. That is your letter to me, isn't it, Mr. Hatch?

A. This is my letter to Mr. Karesh; it is dated March 27, 1944. I still testify that it was during the period, without knowing the exact date, but after the time of the meeting of January 20, that I first heard that there was a possible Selective Service federal statute; whether it was from reading your letter to me or the complaint that was filed by Mr. Romer, which were not far apart, I would not be able to say at this time.

The Court: Read the letter.

Mr. Karesh: I would like to offer the letter in evidence. It is dated March 27, 1944. [162]

(Testimony of Robert E. Hatch.)

“Mr. Joseph Karesh  
Assistant United States Attorney  
Postoffice Building  
San Francisco  
Dear Sir:  
Re John Kan

“I agreed to endeavor to communicate to you the decision of my client on this matter on or before this date. As I told you, we have filed a proceeding under 2084 of the California Code of Civil Procedure, to perpetuate the testimony of Mr. Kan. The court has set that matter for two p.m. on March 31, 1944.

“It is our intention to examine him at length at that time in reference to any claims that Mr. Tsang or the corporation made any agreement or commitment to Mr. Kan, and if so, the precise nature thereof.

“In the meantime I do not see how we can intelligently take a definite position in regard to the claims of Mr. Kan, which so far are quite uncertain. Only tentatively can I say that we dispute there was any agreement to take him back, but none the less we did offer him a suitable position and he has failed to accept it. As previously explained to you, there are many features connected with the transaction that make it impractical and unwise to reemploy the gentleman, regardless of which a bona fide offer to take him back was made. Beyond all this, the reemployment of him at any such figure as

(Testimony of Robert E. Hatch.)

he mentioned is uneconomical for there is no need of anyone at such a salary. [163]

“In summary we do not feel that we are able to give you a complete and definite answer at this moment, but will be immediately upon the completion of his deposition. We would also be happy to supply you with a copy of the same, should you so desire.

Respectfully yours,

ROBERT E. HATCH.”

(The letter is marked Plaintiff’s Exhibit 7.)

The Court: What in that letter has any relation to the subject matter?

Mr. Karesh: That he was in communication with the United States Attorney’s office with respect to the claim of Mr. Kan under the Selective Service Act.

The Court: I mean the subject matter dealt with there. You were inquiring about his knowledge.

Mr. Karesh: He says that up to October, 1944, when this suit was filed in the Superior Court of the City and County of San Francisco, he had no knowledge of Mr. Kan having any rights under the Selective Service Act. This is correspondence that he had with the United States Attorney’s office. I will offer more letters that show that he had communication with the United States Attorney’s office in regard to this matter.

Q. Are these your communications to this office

(Testimony of Robert E. Hatch.)

dated March 31, April 7, March 21, 1944, April 14, 1944, and April 20, 1944?      A. Yes. [164]

Q. These are in relation to negotiations between yourself and our office arising under the Selective Service Act?      A. That is correct.

Mr. Karesh: I would like to offer in evidence only one of these letters, the letter of April 20, 1944, to show that this man was refused employment.

Q. You wrote this letter to us, didn't you?

A. It does not bear my signature but I am sure it was written by me.

Mr. Karesh: It is on the letterhead of Robert E. Hatch. We will offer it in evidence and I would like to read it.

“April 20, 1944

“Hon. Joseph Karesh,

Asst. U. S. Attorney

Postoffice Bldg.

San Francisco

Dear Sir:

By this time you no doubt have received the copy of Mr. Kan's deposition. You will note that he has refused to answer all pertinent questions.

My clients have given this matter considerable thought and take the position that they are under no obligation to Mr. Kan. Without attempting to specify all of their reasons, the following can be enumerated.

1. There was no contract of employment. Kan was an employee whose employment was

(Testimony of Robert E. Hatch.)

subject to termination at the pleasure of his employer, without explanation. Were he re-employed [165] it obviously would be on the same basis, and if discharged within an hour after his reemployment he would have no complaint.

2. There is no opening for him, and the business does not justify the employment of a person at anywheres near the figure he has demanded.

3. His refusal to answer these questions together with his previous manifestations, confirms the belief that Mr. Kan could not and would not be a suitable employee but rather that his presence and activities at the Cathay House would be inimical to the interests of the employer. You will please understand that over a period of years there was a great deal of friction, the attitude and acts of Mr. Kan were highly objectionable to the others, and that this has all been eliminated by the withdrawal of Mr. Kan.

In our opinion, it would be unconscionable to force this gentleman upon the firm as an employee, something that would have no chance of working out and would result to the prejudice of Mr. Kan as well as the others interested in the success of this enterprise.

Respectfully,

ROBERT E. HATCH.

(Testimony of Robert E. Hatch.)

PS. In addition to the foregoing, an offer of reemployment actually was made to Mr. Kan, which he declined because they would not give him a written guaranty of its continuance for the duration of the war."

(The letter is marked Plaintiff's Exhibit 8.)

Q. (By Mr. Karesh): You say that there was a great deal of friction between Mr. Kan and Mr. Tsang prior to the entrance of Mr. Kan into the service.

A. I say I was told that by Mr. Tsang; in fact it came to me as a great surprise because all the time I had been around the Cathay House as a patron they seemed to be very friendly. It was a good act apparently. It was quite a shock to me when Mr. Tsang came and said Mr. Kan wants to come back and I am afraid to take him in; that is the first time I knew there had been any friction.

Q. You never personally witnessed any friction or any words between Mr. Kan and Mr. Tsang, did you? At this meeting in your office was there any friction?

A. Let me answer that this way if I may; none before Kan went in the army; none upon the two occasions in my office. In the first meeting they were friendly and in the second meeting there was no conversation between the two. The meeting only lasted a few minutes. My knowledge of their unfriendliness comes from what I learned from Mr. Tsang and from a little talk about this gun incident.



(Testimony of Robert E. Hatch.)

Q. The answer is not responsive. I asked you whether or not there was any friction in your office?

The Court: Let him answer.

A. The manner in which Mr. Kan proceeded after he was offered the job—— [167]

Mr. Karesh: I will ask that that be stricken; he was never offered a job back.

The Court: He said under oath that he was.

A. Additionally the minutes of the corporation, which came to my attention literally shows that there was unbelievable turmoil between the parties; there were cat and dog fights. I didn't know but I heard of it later.

Q. (By Mr. Karesh): Do you recognize Mr. Tsang's handwriting on this picture?

A. That is Mr. Tsang's and his dog. It is addressed "To Auntie Helen and Uncle Johnny. Sincerely Laddie, age 2 months."

Q. Do you know to who he is referring by "Auntie Helen and Uncle Johnny"?

A. I should say Auntie Helen to be Mrs. Kan.

Q. And Uncle Johnny?

A. I would presume that to be John Kan.

Q. What is the date on that?

A. May 4, 1943, before he went into the service.

Q. Does that reflect any ill feeling?

A. It certainly does not.

Mr. Karesh: I will offer the picture in evidence.

A. I will go a lot farther and that while I do not want to extol Mr. Tsang's qualities, I must say he has made a most extraordinary effort to get

(Testimony of Robert E. Hatch.)

along with Mr. Kan despite the way that Mr. Kan treated him. [168]

Q. As a matter of fact you know that Mr. Tsang was interested in throwing Mr. Kan out of the business because he was jealous of him?

A. That bears no resemblance to the truth. As a matter of fact when Mr. Tsang controlled the company and after Mr. Kan had tried to throw him out, Mr. Tsang permitted Mr. Kan to remain until he went into the service. And when he went into the service he personally undertook to take care of her by employing Mrs. Kan and increasing her wages.

Q. How much?

A. I don't recall but I know she did get more than she did before, and he looked after his interest, kept the business up and when Kan came back, despite the fact that he had had all of this trouble with him he was willing to take him back and give him a chance.

Mr. Karesh: I will ask that the picture be received in evidence.

The Court: It may be admitted and marked.

(The picture is marked Plaintiff's Exhibit 9.)

Q. (By Mr. Karesh): Isn't it true that Mr. Tsang and his people put up \$5300 to acquire the stock?

A. That is my understanding.

Q. As a result of that \$5300 Tsang has profited some \$150,000?

(Testimony of Robert E. Hatch.)

A. Well, I would not think the figures run that high. Whatever profit there was inured proportionately to Mr. Kan and Mr. Tsang in proportion to the amount of their investments. [169]

Q. Isn't it true that it was the personality of Mr. Kan that built up the business?

A. Well, Mr. Kan and several others; not exactly Mr. Kan. What really built up the business was the war coming along.

Q. Is it your testimony that the business lost money the first year that Mr. Tsang was in the business?

A. I don't think I have very definite information—I never had occasion to examine it. I only took their statements on that. I believe that probably the first year, being a new affair, a novel enterprise, like a race track it had a big day on opening day and a bad day the second day. I think that after the novelty wore off the business deteriorated for a period of time.

Q. Isn't it true, and I show you the minutes of a stockholders' meeting that the first year they declared a dividend of 30c on the stock?

A. I have no information on that.

Mr. Karesh: That is all.

The Court: It is now time for adjournment.

(Thereupon an adjournment was taken until tomorrow, September 12, 1947, at 10 a.m.)

Friday, September 12, 1947

ERNEST TSANG

Direct Examination

(Resumed)

By Mr. Hatch:

Q. Mr. Tsang, at the time that Mr. Kan went into the army what salary were you drawing?

A. \$500 a month.

Q. Sometime shortly thereafter that was raised to \$750 a month?

A. That is correct.

Q. Tell us how that came about?

A. The increase in my salary came about after we changed from the corporation to a partnership. At a meeting of all stockholders who were then in San Francisco, the change over was discussed and the matter of what I had to do, and Mr. George Chew who was then a stockholder suggested that inasmuch as I was doing my own work and the work that John Kan had been doing, he suggested that I also take his salary of \$500; I did not want to do that. So I was given \$750 instead of \$500.

Q. That is the manner in which you were raised to \$750?

A. That is correct.

Q. You took on an additional job on the floor as assistant head waiter to do that part of the work which Mr. Kan had been doing previously?

A. Yes, in part.

Q. In part?

A. Yes. [171]

Q. There were other duties of Mr. Kan that you performed; in other words the work that you took over, was that one part of the work that Mr. Kan had been doing?

(Testimony of Ernest Tsang.)

A. That was part of the work that he had been doing.

Q. I don't know whether this is particularly material but inasmuch as it has been brought up, was Mrs. Kan working at the restaurant before Kan went into the service? A. She was.

Q. What was her work?

A. She helped seat the customers and when we had a waiting list she took the names of those customers and they would be called in turn.

Q. You did not serve breakfast?

A. We did not serve breakfast.

Q. Just two meals a day? A. Yes.

Q. She just worked at the time of those two meals? A. That is correct.

Q. What was she receiving in salary before Mr. Kan left?

A. I think she was receiving in the neighborhood of \$65 a month for several hours work in the evening.

Q. And as soon as Mr. Kan went into service what did you do about her wages?

A. Her salary was then increased to \$175 a month.

Q. She did the same work that she had done before for \$65? [172]

A. That is correct.

Q. Was that in view of the fact that Mr. Kan was in the service and his income was reduced?

A. That was what I had in mind.

(Testimony of Ernest Tsang.)

Q. You were the one that raised her salary?

A. That is correct.

Mr. Hatch: No further questions.

Cross-Examination

By Mr. Karesh:

Q. Mr. Tsang, it was Mr. Kan who got you into the business of the Cathay House?

A. He was the one I spoke to when I came up to the Cathay House.

Q. You say it was Mr. Kan who spoke to you. Did you seek out Mr. Kan or did he seek you out?

A. One of the partners had sought me out.

Q. Who was he?

A. His name was Ben, he sought me out.

Q. I am talking about Kan. Did he seek you out?      A. No.

Q. You went up to see Mr. Kan at the Cathay House?      A. That is right.

Q. With respect to buying an interest in the business, is that right?      A. Yes.

Q. What did you tell Mr. Kan.

A. Well, I think it was in the afternoon we had a talk, I don't remember what it was and I said I was willing to invest in the [173] firm.

Q. You did not say you were willing to invest, you said you wanted to invest, didn't you?

A. No, because it was a few weeks before I even decided to invest, after auditing the books; I didn't want to invest before I did that.



(Testimony of Ernest Tsang.)

Q. You were an interpreter with the government?

A. I was both an interpreter and senior clerk.

Q. How much money did you invest in this business?

A. I think it was \$2,000.

Q. \$2,000?

A. Let me think a minute. I don't recall the exact amount.

Q. I think somebody said \$5,000.

Mr. Hatch: That was over a period of time?

A. I think it was \$2,000.

Q. (By Mr. Karesh): What did you get for the \$2,000?

A. Two thousand shares of stock.

Q. Did you go to work for the company then?

A. Yes, I did.

Q. What was your salary?

A. \$50 a month.

Q. What was Mr. Kan's salary?

A. I am not sure; I think it was \$125.

Q. What were your duties in relation to Mr. Kan's?

A. I worked on the floor seating people.

Q. How many hours of the day were you there?

A. In the beginning I worked from five until closing time; at [174] that time we were open until two o'clock.

Q. How long did you get \$50 a month?

A. I received \$50 a month up until a month less than I left my employment.

Q. Then what salary did you receive?

(Testimony of Ernest Tsang.)

A. I think I was raised to a par with Mr. Kan, as I recall.

Q. Who suggested that your salary be raised to the same as Mr. Kan's? A. I don't recall.

Q. It was Mr. Kan that got your salary increased, wasn't it? A. I don't think so.

Q. Who was it?

A. I don't recall who it was but it was not him.

Q. Are you sure it was not Mr. Kan?

A. I think it was not.

Q. On what do you base that?

A. Because at that time there was a lot of trouble between the partners in the firm at that time, and the matter of hours and work done on the premises by various people was discussed and the matter of my salary came up, and that is all I recall about it.

Q. Mr. Kan never opposed your raise in salary, did he? A. I don't recall that he did.

Q. When was your next increase in salary?

A. I think it was some time after that that both Mr. Kan and I [175] were increased at the same time to \$300 a month.

Q. In other words when you got \$300 a month Mr. Kan got \$300 a month, is that right?

A. That is right.

Q. You never had any restaurant experience prior to your going into the Cathay House, did you?

A. Oh, yes, quite a few years.

Q. Where?

A. I don't know as I recall the number of the

(Testimony of Ernest Tsang.)

building they were in business many years ago but I helped establish a restaurant.

Q. How long ago was that prior to your buying in the Cathay House?

A. Well, I would say 16 or 18 years ago.

Q. It was 16 or 18 years prior to your entrance into the business; you had had no experience in the business during that time?

A. Oh, yes; cooking was always my hobby.

Q. But you were not in a restaurant?

A. Not during the years I was with the Immigration.

Q. You got \$300 a month and Kan got \$300 a month. When was the next raise?

A. I don't remember when, but both of us were increased to \$500.

Q. A month?                      A. Yes, a month.

Q. So you were in there for a few months and got \$50 a month, then you got \$125, and both of you went to \$300 and both went up to \$500? [176]

A. That is correct; the difference in our salaries in the beginning was called to the attention of the stockholders because at that time I had \$2,000 invested in contrast to Mr. Kan's \$1,000.

Q. Of course Mr. Kan had started the business.

A. I do not dispute that.

Q. You were saying something about a stockholders meeting.

A. Yes; I recall that I mentioned the disparity between our salaries, and added to my investment

(Testimony of Ernest Tsang.)

in the firm, I thought I was entitled to a larger return.

Q. Then you got it?

A. Yes, I got it, but not because any of the stockholders or Mr. Kan wanted to give it to me, because at no time did I get anything from him or from any of the partners unless I fought for it, because when I went in the firm every one was there before I arrived.

Q. Well, you got your \$300 a month.

A. I got it.

Q. You got your \$500 a month?

A. I certainly did.

Q. You got your \$750 a month, didn't you?

A. Yes.

Q. You got the business transferred from a corporation to a partnership when Mr. Kan was in the army?

A. That is right, for the advantage of all concerned. [177]

Q. Didn't Mrs. Kan tell you her husband was in the service and would you not wait until he came back so that he could discuss the matter of the transfer from the corporation to the partnership.

A. There was no mention of Mr. Kan ever coming back by Mrs. Kan.

Q. Tell us what you said to Mrs. Kan about the transfer of the corporation to the partnership and what she said to you?

A. I explained to Mrs. Kan that the transfer was made solely for the purpose of saving money

(Testimony of Ernest Tsang.)

for the firm, and she informed me that Mr. Kan had told her not to sign any papers unless he was present or his attorney, Mr. Romer, had first perused the papers, and in the alternative was, in the absence of Mr. Kan, to have his attorneys go over the papers, which was done.

Q. Don't you know Mr. Romer had advised Mrs. Tsang not to sign the papers until her husband came back? A. I did not.

Q. It is your testimony that Mrs. Kan never told you at any time to wait if possible until her husband came back?

A. To my recollection she did not.

Q. But you are not positive, are you?

A. I am fairly positive.

Q. Your testimony is Mrs. Kan never told you to wait until her husband came back?

The Court: Doesn't the record disclose that she got the advice of counsel? [178]

Mr. Karesh: But if your Honor please, might I recall this is where a woman asks——

The Court: I am not concerned about that. I want to get what the record discloses. Did she have legal advice before the transfer was made?

Mr. Karesh: If your Honor please, where a woman asks——

The Court: I am not asking that. I am asking does the record disclose she had legal advice before the transfer was made.

Mr. Karesh: She had legal advice.

(Testimony of Ernest Tsang.)

The Court: That is all I wanted to know. Proceed.

Mr. Karesh: I am entitled to ask him now——

The Court: You are entitled to ask him what the record disclosed at that time.

Mr. Karesh: I did not say she had not legal advice.

The Court: Who was her attorney?

Mr. Karesh: Mr. Romer.

The Court: Proceed with the case.

Mr. Karesh: Might I respectfully ask the question again as to whether Mrs. Kan did not ask you to wait until her husband came back from the service.

A. I don't recall that she ever did ask me to wait.

Q. Then did all of the stockholders vote you \$750 a month?

A. With the exception of Mrs. Kan.

Q. Who was present at that meeting when you were voted the \$750 a month? [179]

A. Mr. Philip Fong——

Q. Your friend?

A. He is now my friend. Fred Leong, Mrs. Kan, George Chew, George Chin; all the stockholders with the exception of Mr. Kan.

Q. Did Mrs. Kan oppose your raise?

A. She did not oppose it but she informed me that inasmuch as her husband was not here she thought it would be better if she did not because



(Testimony of Ernest Tsang.)

there were already enough signatures to effect my increase in salary.

Q. Of course you had control of the stock at that time any way, didn't you?

A. I did, but at no time did I exercise it.

Mr. Hatch: So that there will be no mistake about it this is a partnership, not a corporation.

Mr. Karesh: I mean a controlling interest.

Mr. Hatch: That would be argumentative.

Q. (By Mr. Karesh): How many shares did you have, that is of record?

Mr. Hatch: He had more than one half of the partnership interest.

Q. (By Mr. Karesh): What about Mr. Yuke?

A. Yuke had 100 shares assigned to him; during the time the business was incorporated I assigned the stock to him so that he would have enough to be a director on the board.

Q. In other words that was your stock that you gave him? [180]

A. I assigned it over to him.

Q. Without any consideration at all?

A. You mean any cash consideration?

Q. Yes. A. That is correct.

Q. What about Mrs. Lorene Carter?

A. The same situation existed there.

Q. You gave her 100 shares?

A. I did not give her any shares. As a matter of record it is mine.

Q. You mean they were dummies for you?

(Testimony of Ernest Tsang.)

A. I would not call them dummies, but we still had to get enough directors.

Q. Didn't you have enough directors for the board?      A. No.

Q. Did you put them on so that you could vote Mr. Kan out of the business?

A. That was not the case when I could have voted Mr. Kan out of the business; with those two persons holding stock in the names, and I did not vote him out.

Q. Who signed the contract of employment at \$750 a month?

A. Those that I have just mentioned.

Q. Tell me how much did you invest in this business?      A. A total of \$5500.

Q. How much have you taken out?

A. I have taken out quite a bit. [181]

Q. How much?

A. I don't recall; over all these years I don't recall how much. I took it out in proportion to my investment.

Q. I did not ask you that. I am asking how much you took out of that business?

Mr. Hatch: That is immaterial. It has nothing to do with the case.

The Court: The objection is sustained.

Q. (By Mr. Karesh): How often did the partners meet?

A. You are referring to the partnership?

Q. The partners of the partnership?

(Testimony of Ernest Tsang.)

A. I don't think we had any regular schedule of meeting.

Q. In fact you hardly met at all; you just run the whole business, didn't you?

A. That is correct.

Q. Tell me, you and Mr. Kan were very friendly before he went into the service, weren't you?

A. I wouldn't say so.

Q. What would you say?

A. I would not say we were friendly except on the surface.

Q. Mr. Kan was very able and held the title of general manager of the Cathay House, did he not?

A. There never was the title of general manager.

Q. What was he?

A. The corporation never did accord that title nor did the partnership. [182]

Q. You and he were general co-managers?

A. I never called him general manager. We were co-managers.

Q. What made you angry at Mr. Kan, what did he do prior to going into the service that made you angry?

A. It got to a point where we were angry at each other.

Q. What about this picture that you gave him? I want to show it to you. Now on May 4, 1943, you were very friendly with him, weren't you? You gave him this picture? A. Yes.

Q. Weren't you friendly then?

A. On the surface I was.

(Testimony of Ernest Tsang.)

Q. Why didn't you discharge him? You had control of the partnership, why didn't you discharge him?

A. You want to know why I didn't discharge him?

Q. Yes.

A. Mr. Kan was in there ahead of me, and I had known him for a number of years, and I did not want to discharge him because we were living in a small community, and I did not want to discharge him.

Q. This picture was just a fake picture?

A. I would not say it was a fake picture.

Mr. Karesh: I would like to show this picture to your Honor.

The Court: I am not interested in the picture. This case does not depend on the merits of the picture. Proceed with the case.

Mr. Karesh: May I make this observation?

The Court: Proceed and get through with the witness. We have spent enough time on this case.

Mr. Karesh: Your Honor has made the observation that you did not consider the picture important.

The Court: I do not.

Mr. Karesh: May I tell you why I consider it important?

The Court: Proceed with your examination.

Q. (By Mr. Karesh) At the time Mr. Kan went into the service you were very friendly to him, weren't you? A. No.

Q. Didn't you give him a party and didn't you

(Testimony of Ernest Tsang.)

tell him when he came back from the war everything would be all right and he would be back on his job? Didn't you tell him that before he went into the service?

A. I don't recall what I told him, the exact words. I gave him a parting gift.

Q. What?

A. I gave him one of the combat swords.

Q. Didn't you tell him everything would be the same when he got back?

A. I told him not to worry.

Q. You told him not to worry.

A. Yes, and he had no occasion to worry.

Q. At all times when you and Mr. Kan were in the place your names were used on the matches and on the advertising.

A. Oh no, not at all times. [184]

Q. Here are some matches; do you recognize these.

A. I do.

Q. Do you recognize these match boxes?

A. I do.

Q. They have the names Kan and Tsang on them?

A. That does not indicate they were on there at all times.

Q. Even as early as 1941 there was an article in the paper mentioning the names of Kan and Tsang. Do you recognize that article?

A. I recognize that but that does not mean that my name was on everything with his at all times.

(Testimony of Ernest Tsang.)

Q. Would you say the first year you were in business the business lost money?

A. That is a broad statement. The first part of the first year the firm lost money; when I went in the firm I had the biggest investment, and as I recall the firm was around \$15,000 in the hole and the last of the first year the firm began making money.

Q. At the end of the first year you were in there was a dividend of 30 cents on the dollar. Let me show you the records of the stockholders meeting. Look at the September 30, 1940, stockholders meeting and see if you did not make money that first year and the meeting of September 29, 1941, and tell me if you did not make money?

A. We made money every year. [184-a]

Q. As a matter of fact you did not put an extra \$3,000 in there because the business needed money but you put it in there because you wanted to invest in the business?

A. That is a matter of opinion.

Q. Why did you put the extra \$3,000 in?

A. All right, I will tell you; when I went in the firm it was around \$15,000 in the hole and the business had proceeded to a point that the Chinese merchants in Chinatown refused to sell goods to the Cathay House and they even went so far as to print bulletins by the Chinese brokers association—

Q. When was this?

A. Around the time I went into the firm. This association had printed bulletins asking all members to refrain from selling goods to the Cathay



(Testimony of Ernest Tsang.)

House; I knew of that fact when I went in; I also knew the firm was in the hole; but I thought the business could be put on a basis favorable to making money; so I went to the secretary of that association and said to them that I was going into the firm, and his reply to that was that is all I want, I just want to talk to some one in the firm. At that time they were \$15,000 in the hole, and——

Q. That is not what I am speaking about. When you invested the \$3,000 that was not because the firm needed money then but you wanted to buy extra shares of stock?

A. That is not correct.

Q. Tell us what is correct. [185]

Mr. Hatch: At *this* I will make an objection that this is entirely extraneous to the issues in this proceeding and irrelevant.

The Court: I will sustain the objection.

Mr. Karesh: At this time I will offer in evidence the stockholders meeting of September 30, 1940, and the stockholders meeting of September 29, 1941, showing profits and dividends.

The Court: They may be admitted.

(Stockholders Meeting of September 30, 1940, is marked Plaintiff's Exhibit 10 and Stockholders meeting of September 29, 1941, is marked Plaintiff's Exhibit 11.)

Q. (By Mr. Karesh): When Mr. Kan came back from the service when did you first see him?

A. I presume the first day of his return.

Q. When was that?

(Testimony of Ernest Tsang.)

A. I don't recall the date; he has stated for the record what date it was. I do not remember the date.

Q. Was that the day you went from the Cathay House down to Fishermen's Wharf? A. No.

Q. Tell us what happened that first day?

A. As I stated previously, I was working at the cashier's desk, because we had no cashier that day, and I had no inkling Mr. Kan was returning, and all of a sudden he was standing in front of me. [186]

Q. In uniform?

A. In uniform, yes. I shook hands with him and said, "Glad to see you," or words to that effect.

Q. Were you glad to see him?

A. Whether I was or not I showed the glad hand to him, and he said to me, "How about a job," and I said, "O. K., come back any time you are ready," and he looked at me very closely, and pulled out a paper which happened to be his discharge, and I said, "Why didn't you let me know you were coming out or being discharged?" Prior to that I had heard rumors that he was coming out but I didn't know that he was.

Q. So you said you would put him to work?

A. Yes.

Q. Why didn't you put him to work?

A. He wanted two weeks vacation, which was agreeable to me.

Q. Did you tell him it was agreeable?

A. Absolutely.

(Testimony of Ernest Tsang.)

Q. Did you tell him to come to work two weeks from then?

A. He said two weeks vacation and I will come back to work, and I said "O. K."

Q. Then what happened?

A. After this two weeks had elapsed—I don't recall whether I saw Mr. Kan during that period or not, but at the expiration of two weeks he came in.

Q. What did he say? [187]

A. I said, "Are you ready to go to work?" and he said "Yes, but there are a few things we will have to talk over." I said, "Fine," and he said, "Let us have lunch at Fishermen's Wharf and *take* matters over." I was agreeable. I don't recall whether it was that day or the following day or several days later, we met and had lunch at Fishermen's Wharf as Mr. Kan described. After lunch I asked Mr. Kan what he wanted to talk about, if he was ready to come back to work; he told me he wanted to talk about salary of \$750 a month I was getting and thought he was entitled to the same.

Q. What did you say?

A. I explained to him that I was not empowered to raise him to \$750 a month; that the raising from the \$500 to \$750 would have to come from the stockholders; that I was empowered to give him \$500 a month. That was the gist of the conversation.

Q. Then what did he say?

A. He said he wanted \$750 a month.

Q. Go on.

(Testimony of Ernest Tsang.)

A. And if I did not give it to him he would see that I received a lot of bad publicity.

Q. What did you say?

A. Well, I kept myself in check; I did not get mad, tried not to anyway. I told him I was not the one in the firm to talk about this, he would have to talk to the other partners, and inasmuch as Mr. George Chew was the next largest stockholder that he see him. [188]

Q. By the way, the company could very well have afforded to have given him \$750 a month, couldn't it?

Mr. Hatch: I object to that as immaterial.

The Court: Objection sustained.

Mr. Karesh: Might I say——

The Court: The Court has ruled; what they could afford to do is not an issue in this case.

Mr. Karesh: For the sake of the record, may I make my offer of what I am trying to prove. The Selective Service Act says that a man is entitled to his job——

The Court: I know what the Act says. Proceed with the witness.

Q. (By Mr. Karesh): Go ahead; what happened after that?

A. I believe the meeting ended at that point.

Q. Did you take it up with the stockholders about raising it up to \$750?

A. I did not because Mr. Chew was in Los Angeles and would not be back for several days.

Q. Did you ever take it up?

(Testimony of Ernest Tsang.)

A. Several days after that Mr. Kan came in and saw me again.

Q. Did you ever take it up with the stockholders or shareholders? A. You mean all of them?

Q. Yes, at a meeting. Did you ever call a meeting and ask them to consider this matter of \$750 a month? A. I did not.

Q. Can you explain why you did not? [189]

A. Because I felt that the man was entitled to \$500 a month; that is what I was offering him. I also told him that he go back to work at \$500 a month and that it could be decided on later as to the \$750.

Q. Did you tell him that? A. Yes.

Q. You remember you gave a deposition on the 11th of January, 1945, at Mr. Hatch's office, 1320 Mills Tower. A. Yes.

Q. Did you ever say that in your deposition?

A. I don't recall that I was asked that.

Mr. Hatch: It is not only in the testimony but it is in Mr. Kan's deposition to the same effect.

Mr. Karesh: What?

Mr. Hatch: That Mr. Tsang told him to go back to work at \$500 and they would determine what the salary was to be. That is in Mr. Kan's testimony; I read it yesterday.

Mr. Karesh: Did you read it?

Mr. Hatch: Yes. I read it yesterday; do you want me to read it again?

Mr. Karesh: Yes.

The Court: We will take a recess.

(Testimony of Ernest Tsang.)

(After recess.)

Mr. Karesh: All right, Mr. Hatch; you said you had something to read.

Mr. Hatch: This is on page 34 of Mr. Kan's deposition, [190] line 18. These are questions by me:

"Q. Let us put it this way: In the month of December of 1943, did you at any time express a willingness to return to Cathay House and go to work pending a decision as to what your rate of pay would be? A. I did.

"Q. You did agree to that? A. Yes.

"Q. And who was to make the decision as to the rate of pay?

"A. Mr. Tsang was to see Mr. Chew and get his approval.

"Q. And did you agree that you would be bound by either their decision or that you would resolve your own opinion on the subject? Do you understand the question?

"A. Will you say that again?

"Q. Yes. Did you agree that you would accept whatever wage they decided you should have?

"Q. (By Mr. Ames): In other words, did you say so to anybody?

"Mr. Hatch: That is right.

"A. Yes. Well, here is the way the discussion went on. As I told you before, we discussed whether the salary would be \$500 a month or \$750 a month; and Mr. Tsang said that he would see Mr. Chew about it; and it was my



(Testimony of Ernest Tsang.)

suggestion that I come back to work pending their decision as to whether the salary would be \$500 or \$750 a month.

“Mr. Hatch: The range was between those two limits, so far as you were concerned? [191]

“A. Yes.”

I must point out that Kan's testimony is that he made the suggestion that he go back to work and abide by the decision as to whether it was to be \$500 or \$750, and that neither Mr. Chew or Mr. Tsang would make any agreement as to more than \$500 a month. When I indicated that I thought that the testimony had already come in on that it was in response to a question by Mr. Karesh a few minutes ago addressed to Mr. Tsang as to whether he ever so testified. I have read the deposition of Mr. Tsang, and that deposition was taken by Judge Ames, and you will find the question where he asked for the information which Mr. Karesh wanted to know if Mr. Tsang so testified.

Mr. Karesh: And he did not so testify.

Mr. Hatch: No, he did not so testify; neither was he asked any question that would tend to elicit that information.

Mr. Karesh: I will read that into the record. I am referring to the deposition of Ernest Tsang taken in the office of Robert Hatch, 1320 Mills Tower, on the 11th of January, 1945. I will turn now to page 18, line 1. You will concede that this is what he said there?

Mr. Hatch: Yes.

(Testimony of Ernest Tsang.)

“Q. (By Mr. Karesh): Very well. We will have to go into this definitely, then. You had a conversation with Kan about December 15, 1943, is that right? [192] A. That’s correct.

“Q. Where did that conversation take place?

“A. It took place at the restaurant called *Gishermen’s Grotto*.

“Q. Who was present besides you and Kan?

“A. No one else.

“Q. And did Kan at that time demand to be restored to his former position?

“A. He didn’t demand it. We merely discussed it.

“Q. Well——

“A. And prior to that——

“Q. We won’t quibble with words about it. Did he ask then to be restored to his position?

“A. I had informed him before that that he would be.

“Q. Please answer the question. Did he ask to be restored to his position in the Cathay House?

“A. No, he did not. He did not have to.

“Q. He did not. Well, the answer is no, then, is that right? A. That’s correct.

“Q. What is the next date that you have there?”

Preceding this, going back to page 17, it shows that Mr. Tsang is a stenographer and had some notes. That is correct?

(Testimony of Ernest Tsang.)

A. That is correct. They were dates of various meetings I had with Mr. Kan.

Mr. Karesh: Continuing on page 18:

“Q. What is the next date that you have there? A. January 2nd, 1944. [193]

“Q. And does that refer to a conversation with Kan? A. It does.

“Q. Where did that conversation take place?

“A. In the office of the Cathay House.

“Q. Who was present besides you and Kan?

“A. No one else.

“Q. At that time, did he request to be restored to his former position?

“A. At that time, he—or I will answer the question yes; but he also demanded \$750 a month salary.

“Q. I see. He asked to be restored on the same salary basis that you were getting, is that right? A. That's correct.

“Q. And what was your answer to that?

“A. I informed him, as I had on previous occasions, that I had no power to grant him \$750 a month, because that salary was granted me by the majority of the stockholders.

“Q. Is that the answer that you gave him at that time? A. That's correct.”

Mr. Hatch: We will stipulate that those answers were given at that time.

Q. (By Mr. Karesh): Did you take it up with

(Testimony of Ernest Tsang.)

the other partners at a meeting to see whether he would get \$750 a month?

A. I took it up with George Chew.

Q. Did you take it up with the other members of the partnership?

A. Not the other members individually. [194]

Q. Then when you told him that \$750 a month could be given only by the action of the other partners you were not telling him the truth, were you?

A. I took it up with Mr. Chew.

Q. What about the other partners? Who were the other partners then?

A. Fred Leong, Mr. Chin, Philip Fong, Mrs. Kan and partners of record Mrs. Carter and Mr. Yuke.

Q. Did you take it up with Mrs. Carter?

A. No, it was not necessary.

Q. Why wasn't it necessary?

A. It was not necessary because it was deemed her stock was mine.

Q. Did you take it up with Mr. Yuke?

A. I did not take it up with him; I mentioned it to him.

Q. Why did you tell Mr. Kan that you would have to take it up with the other partners?

A. I could not give him the increase that he wanted unless everyone was in agreement with it.

Q. What did Mr. Chew say?

A. Mr. Chew was not in agreement.

Q. Did you say you were in agreement?

(Testimony of Ernest Tsang.)

A. I had indicated how I felt to Kan right along; I could not give him \$750.

Q. You had a right to vote on whether he would get a salary of \$750? A. I did. [195]

Q. Did you vote on it? A. I did not.

Q. Did you tell Mr. Chew that you were for it or against it? A. I told him neither way.

Q. Did Mr. Chew say why he was not in agreement?

A. Yes; I recall he said that there was no necessity of two receiving \$750 a month, but that he was willing that Mr. Kan come back at \$500 a month.

Q. What did you tell Mr. Chew?

A. I was in agreement with him and I so communicated to Mr. Kan.

Q. Calling your attention to the meeting at Mr. Hatch's office where something was said about a release, what was said about a release?

A. The release was just in the form of an agreement between the two of us that we would let bygones be bygones and not take up our clashes and bickerings.

Q. Wouldn't a word between you be enough?

A. In my opinion my word would have been enough.

Q. What about Mr. Kan's word?

A. I wanted to get something in writing.

Q. Just precisely what did you want him to write?

A. It was not my suggestion that the release be

(Testimony of Ernest Tsang.)

drawn up. I brought the matter to Mr. Hatch and he suggested that such a release be drawn up.

Q. You mean he was your lawyer or he was going to be the arbitrator? [196]

A. No. I frequently consulted him previously about the Cathay House and I went to Mr. Hatch.

Q. I want to know what the release was?

A. Nothing was drawn up. I left it to Mr. Hatch.

Q. You were there when Mr. Hatch talked about bygones, letting bygones be bygones.

A. Yes, along those lines. It never reached a point where it was drawn up.

Q. You testified on direct examination that you always were willing to give Mr. Kan his job back.

A. I have been.

Q. Up to what point have you been?

A. Up to the point of the gun incident.

Q. What was the date of the alleged incident with the gun?

A. The incident of the gun occurred around the early part of December, 1943, shortly after he returned from the Army.

Q. Then in December, 1943, you were not going to give him his job back?

Mr. Hatch: That is objected to as being immaterial, irrelevant and incompetent.

The Court: He may answer.

A. It was not until January, at the meeting in Mr. Hatch's office, that I did not want to give him back his job, but up to the time of the gun incident I was still willing to give him back his job if



(Testimony of Ernest Tsang.)

Mr. Hatch could proceed along lines to bring us into harmony. [197]

Q. Then there were no conditions attached?

A. They were conditions of my own.

Q. It was at that time that you resolved you were never going to give him the job back?

A. I did not resolve not to give him his job back.

The Court: Is that all with this witness?

Mr. Karesh: That is all.

### Redirect Examination

By Mr. Hatch:

Q. When you made an additional investment in the Cathay House, that is after the initial investment of \$2,000, was Mr. Kan given the same opportunity to come in and make an additional investment?

A. Oh, yes, he was.

Q. Did you have any idea whatsoever at the time the transfer was made from the corporation to the partnership and the partnership articles were signed that Mr. Kan had any expectation of returning?

A. None whatsoever.

Q. Was it your understanding that he had enlisted for the duration of the war?

A. That was my understanding.

Q. And the war was not over at that time?

A. That is correct.

Q. As far as you knew he might or might not ever come back?

A. That is correct.

Q. When it would be you had no idea?

A. That is correct.

Mr. Hatch: No further questions.

The Court: Step down. [198]

Mr. Karesh: I will recall Mrs. Kan.

Mr. Hatch: Is this rebuttal?

Mr. Karesh: Yes.

Mr. Hatch: Before the defense closes I wish to add that the judgment in the State Court we have referred to already has become final, and I do not have a certified copy of the remittitur. I trust that Mr. Karesh will stipulate that the judgment of Judge Deasy was affirmed by the District Court of Appeal and that the remittitur was filed more than sixty days ago. That stipulation I request without prejudice to his objection that it is immaterial, irrelevant and incompetent.

Mr. Karesh: So stipulated.

The Court: Let the record so show.

Mr. Hatch: The defense rests.

#### HELEN KAN

recalled on behalf of petitioner in rebuttal; previously sworn.

Q. (By Mr. Karesh): Mrs. Kan, do you recall when your husband was in service that Mr. Tsang had some conversation with you about a transfer of the corporation? A. Yes.

Q. Did you tell Mr. Tsang that you would prefer to wait until your husband came back from the service?

A. I told him that I expected my husband home

(Testimony of Helen Kan.)

on furlough, I [199] did not know exactly when, but I would like to wait.

Q. What did he say?

A. He seemed to be in a hurry to get the papers through. He said that it was near the end of the fiscal year, and he wanted to have the meeting and change it over to the partnership.

Q. Am I correct that your testimony is that you told him your husband would soon be home on furlough?

A. Yes, I told him, I did not know when, but I expected him.

Q. How much salary were you making when your first started? How much salary were you making when you first started?

A. I worked evenings during the dinner time and my salary was \$65 a month.

Q. When was your salary raised?

A. When my husband went in the Army it was raised to \$150 a month working full time, and then it was increased to \$175.

Q. At the meeting when the corporation was changed to a partnership was any discussion had about the protection of your husband's rights?

A. No, not at all.

Q. Was anything said about your husband would be looked out for?

A. I made the statement that I did not care what Mr. Tsang did in the interest of the business, but that my main reason was that when my husband came back his status would be the same. The book-

(Testimony of Helen Kan.)

keeper was there, and spoke about the money of Mr. Tsang saving the business, that Mr. Tsang was general partner [200] and took all responsibility, and was liable for everything.

Q. Who else was there, do you remember?

A. Well, Mr. Philip Fong, Mr. George Chew, Mrs. Carter, Mr. Yuke, myself and Mr. Tsang.

Q. Who did all of the talking?

A. Mr. Tsang and Mr. Yuke did most of the talking.

Q. Who was the one that was praising Mr. Tsang?      A. Mr. Yuke.

Q. It is true, is it not, that when Mr. Kan went into the service he volunteered for the duration of the war?      A. That is right.

Q. In anticipation of his being away he executed to you a general power of attorney?

A. That is right.

Q. To look after his interest in the Cathay House?      A. Yes.

Q. He had no particular interest to be covered by a power of attorney?

A. No, not that I know of.

Q. He also admonished you at that time if anything came up in regard to the Cathay House other than routine matters you were to consult his attorney, Sidney Romer?      A. Yes.

Q. When the articles of partnership were submitted for your signature and the signature of your husband, you did take the matter up with Mr. Romer?

(Testimony of Helen Kan.)

A. Well, Mr. Tsang showed me some papers which he had drawn up, and asked me to look at them, and he took them down to Mr. Romer.

Q. And Mr. Romer did approve them?

A. Yes, he said they were technically correct.

Q. He also approved the plan in order to minimize the taxes?

A. That is correct, that is what I was led to believe.

Q. At that time your husband was in the Army in this country?      A. Yes.

Q. You were in constant communication with him?      A. I wrote him.

Q. You were able to reach him on the telephone or telegraph or by mail inside of a few days' period?

A. Yes, if the mail went through; I could not reach him by telephone unless he called me.

Q. As a matter of fact, the matter of a change over to a partnership was brought to your husband's attention at least tentatively before he went into the Army?

A. Well, he did not discuss it with me, but I understood that Mr. Tsang was in favor of the change.

Q. That is, before your husband went into the service?      A. Yes.

Mr. Karesh: No further questions.

The Court: Is that all from this witness? [202]

Mr. Hatch: Yes.

JOHN J. KAN

recalled in rebuttal; previously sworn.

Mr. Karesh: Mr. Kan, at the first meeting you had with Mr. Tsang did Mr. Tsang tell you to go back to work at \$500 a month and we will decide on the 750? A. He never mentioned it.

Q. Tell us just what was said in that regard.

A. Well, when we came to discuss the salary, I told Mr. Tsang why don't I go back at 500 a month until it can be decided by Mr. Chew whether the salary would be 500 or 750.

Q. What did he say?

A. He said it would be best to wait until Mr. Chew came in town.

Q. Did Mr. Tsang ever tell you that you could go back at \$500 a month without signing any release? A. No.

Q. Did you ever have any conversation with Mr. Tsang relating to the change of business from the corporation to a partnership?

A. We had several discussions about different phases of operation, nothing concrete.

The Court: His wife testified it was discussed before he went into the service, is that right?

A. I believe it was discussed. [203]

Q. (By Mr. Karesh): Tell us what was said at the discussion? Your wife has testified you had a discussion.

A. Well, I think we were discussing taxes at that time, just prior to my entry into the United States Army, and there was a discussion between



(Testimony of John J. Kan.)

Mr. Tsang and myself as to what would be the best way to save taxes. It was not much further than that.

Q. Did you ever approve the transfer from the corporation to the partnership? A. I did not.

Q. When you went into the service did Mr. Tsang tell you when you came back everything would be the same?

A. Yes, he did repeatedly tell me that.

Q. You enlisted in the armed forces?

A. I did.

Mr. Karesh: No further questions.

Mr. Hatch: No questions.

Mr. Karesh: There is just one more thing, Mr. Romer had to be in Oakland, and Mr. Romer informed me that his testimony would be that he asked Tsang or Hatch to wait if possible until Mr. Kan came back, so that he could look over this transaction for the transfer of the corporation to the partnership. I wonder if you would stipulate that Mr. Romer would say that.

Mr. Hatch: We will stipulate on the strength of Mr. Karesh's statement that Mr. Romer would so testify, together with the testimony of Mr. Tsang that it was not addressed to [204] him, or my testimony it was not addressed to me. I never spoke to Mr. Romer before he came to my office. But I think it is an inconsequential matter. The reason for it was that they wanted to save taxes immediately, and there was no indication when Mr. Kan

would return. He might have stayed in the Army for another twenty years, if the war continued.

Mr. Karesh: We rest.

Mr. Hatch: Nothing further.

(Testimony closed.)

---

[Endorsed]: No. 11891. United States Circuit Court of Appeals for the Ninth Circuit. Ernest Tsang, appellant, vs. John Joseph Kan, appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 5, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

---

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11,891

ERNEST TSANG, et al.,

Appellant,

vs.

JOHN KAN,

Appellee.

# STATEMENT OF POINTS ON APPEAL

## Rule 19 (6)

The following is a statement of the points upon which appellant intends to rely and designates the

entirety of the record for the consideration thereof:

(1) The Findings of Fact are contrary to law and beyond the jurisdiction of the District Court in that they are contrary to the Findings of Fact made by the state court, which latter findings were final and therefore *res judicata*.

(2) The Conclusions of Law and Judgment are contrary to law and beyond the jurisdiction of the District Court in that they are contrary to the Findings of Fact, Conclusions of Law and Judgment made by the state court, which latter findings, conclusions and judgment were final and therefore *res judicata*.

(3) The Findings of Fact are and each of them is contrary to the evidence.

(4) The Conclusions of Law are and each of them is contrary to the evidence and the law applicable thereto.

(5) The Judgment is contrary to the evidence and the law applicable thereto.

(6) The court should have granted the Motion for Dismissal.

(7) The court should have granted the Motion for New Trial.

(8) The court should not have granted the Motion to Vacate Order and for Reconsideration.

(9) The court should have granted judgment to respondent in accord with the First Defense set forth in his Answer.

(10) The court should have granted judgment to respondent in accord with the Second Defense set forth in his Answer.

(11) The court should have granted judgment to respondent in accord with the Third Defense set forth in his Answer.

(12) The court should have granted judgment to respondent in accord with the Fourth Defense set forth in his Answer.

(13) The court should have granted judgment to respondent in accord with the Fifth Defense set forth in his Supplement to Answer.

(14) The court should have granted judgment to respondent in accord with the Sixth Defense set forth in his Supplement to Answer.

/s/ ROBERT E. HATCH,  
Attorney for Appellant.

Copy received April 16th, 1948.

/s/ FRANK J. HENNESSY,  
/s/ J. M. KARESH,  
Attorneys for Appellee.

[Endorsed]: Filed April 21, 1948.

